TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 71

LONNIE AFFRONTI, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 12, 1955.

CERTIORARI GRANTED JUNE 6, 1955

SUPREME COURT OF THE UNITED STATES

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LONNIE AFFRONTI, PETITIONER,

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 13, 1955

—2940-5

[fol. 1] Record entry of return of indictment (omitted in printing).

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

No. 11266

UNITED STATES OF AMERICA, Plaintiff,

vs.

LONNIE AFFRONTI, Alias Lonnie Affrontia, Alias Lonnie A'Fronte, Defendant

INDICTMENT—Filed January 21, 1932

The grand jurors of the United States of America, duly and legally chosen, selected, summoned and drawn from the body of the Western District of Missouri, and duly and legally empaneled, sworn and charged to inquire of and concerning crimes and offenses against the United States of America in the Western District of Missouri, upon their oaths present and charge that one Lonnie Affronti, alias Lonnie Affrontia, alias Lonnie A'Fronte, whose name other than herein set forth is to the grand jury unknown, did on the 18th day of June 1931, at 9th and Locust Streets, Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, unlawfully, wilfully, knowingly and feloniously sell two hundred and thirty grains of morphine, a derivative of opium, not from [fol. 2] the original stamped package and not in the original stamped package, and upon which the tax had not been paid as was required by law;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count II

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that one Lonnie Affronti, alias Lonnie Affrontia, alias Lonnie A'Fronte, whose name other than as herein set forth is to the grand

jury unknown, did on the 20th day of October, 1931, at and near Gladstone Boulevard and Windsor Avenue, Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, unlawfully, wilfully, knowingly and feloniously sell One Hundred and nineteen grains of morphine, a derivative of opium not from the original stamped package and not in the original stamped package and upon which the tax had not been paid as was required by law;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count III

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that one Lonnie Affronti, alias Lonnie Affrontia, alias Lonnie A'Fronte, whose name other than as herein set forth is to the grand jury unknown, did on the 28th day of October, 1931, at and near Gladstone Boulevard and Windsor Avenue, Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, unlawfully, wilfully, knowingly and feloniously sell one hundred twenty one grains of morphine, a derivative of opium not from the original stamped package and not in the original stamped package and upon which the tax had not been paid as was required by law;

[fol. 3] Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count IV

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that one Lonnie Affronti, alias Lonnie Affrontia, alias Lonnie A'Fronte, whose name other than as herein set forth is to the grand jury unknown, did on the 4th day of November, 1931, at and near Gladstone Boulevard and Windsor Avenue, Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, unlawfully, wilfully, knowingly and feloniously sell one hundred fourteen grains of morphine, a derivative of opium not from the

original stamped package and not in the original stamped package and upon which the tax had not been paid as was required by law;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count V

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that one Lonnie Affronti, alias Lonnie Affrontia, alias A'Fronte whose name other than as herein set forth is to the Grand jury unknown, did on the 11th day of November, 1931, at and near Gladstone Boulevard and Windsor Avenue, Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, unlawfully, wilfully, knowingly and feloniously sell ninety two grains of morphine, a derivative of opium not from the original stamped package and not in the original stamped package and upon which the tax had not been paid as was required by law;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

[fol. 4]

Count VI

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that one Lonnie Affronti, alias Lonnie Affrontia, alias Lonnie A'Fronte, whose name other than as herein set forth is to the grand jury unknown, did on the 17th day of November, 1931, at and near Gladstone Boulevard and Windsor Avenue, Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, unlawfully, wilfully, knowingly and feloniously sell eighty five grains of morphine, a derivative of opium not from the original stamped package and not in the original stamped package and upon which the tax had not been paid as was required by law;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count VII

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that one Lonnie Affronti, [alise] Lonnie Affrontia, alias Lonnie A. A'Fronte, whose name other than as herein set forth is to the grand jury unknown, did on the 1st day of December, 1931, at Independence and Lydia Avenues, Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, unlawfully, wilfully, knowingly and feloniously sell one hundred forty two grains of morphine, a derivative of opium not from the original stamped package and not in the original stamped package and upon which the tax had not been paid as was required by law;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count VIII

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that one Lonnie Affronti, alias Lonnie Affrontia, alias Lonnie A'Fronte, [fol. 5] whose name other than as herein set forth is to the grand jury unknown, did on the 10th day of December, 1931, at Independence and Lydia Avenues, Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, unlawfully, wilfully, knowingly and feloniously sell one hundred forty five grains of morphine, a derivative of opium not from the original stamped package and not in the original stamped package and upon which the tax had not been paid as was required by law;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count IX

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that one Lonnie Affronti, alias Lonnie Affrontia, alias Lonnie A'Fronte, whose name other than as herein set forth is to the grand

jury unknown, did on the 18th day of December, 1931, at Independence and Lydia Avenues, Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, unlawfully, wilfully, knowingly and feloniously sell two hundred and three grains of morphine, a derivative of opium not from the original stamped package and not in the original stamped package and upon which the tax had not been paid as was required by law;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count X

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that one Lonnie Affronti, alias Lonnie Affrontia, alias Lonnie A'Fronte whose name other than as herein set forth is to the grand jury unknown, did on the 2nd day of January, 1932, at 1207 Troost Avenue, Kansas City, Jackson County, Missouri, in the Western Division of the Western District of Missouri, unlawfullly, wilfully, knowingly and feloniously sell two hundred and three grains of morphine, a derivative [fol. 6] of opium not from the original stamped package and not in the original stamped package and upon which the tax had not been paid as was required by law;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

S. M. Carmean, Assistant United States Attorney.

A True Bill: Walter Ragland (Ragland), Foreman of the Grand Jury.

Attest: A true copy.

A. L. Arnold, Clerk By N. G. Smith, Deputy. (Seal.)

[File endorsement omitted.]

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MISSOURI

No. 11266

UNITED STATES OF AMERICA

vs.

LONNIE AFFRONTI, Alias Lonnie Affrontia, Alias Lonnie A'Fronte

Criminal Indictment in Ten Counts for Violation of Harrison Narcotic Act

JUDGMENT AND COMMITMENT—January 26, 1944

On this 26th day of January, 1944, came the United States Attorney, and the defendant, Lonnie Affronti, alias Lonnie Affrontia, alias Lonnie A'Fronte, appearing in person, and by counsel, and

The defendant having been convicted on verdict of guilty of the offenses charged in counts two, three, four, five, six, [fol. 7] seven, eight, nine and ten of the Indictment in the above-entitled cause, to wit: unlawfully, wilfully, knowingly and feloniously sell morphine, a derivative of opium, not from the original stamped package and not in the original stamped package and upon which the tax had not been paid as required by law, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court

Ordered And Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five (5) years on each of counts two, three, four, five, six, seven, eight, nine and ten of the Indictment; the sentence imposed on count three to begin to run at the expiration of the sentence imposed on count two; the sentence imposed on count four to begin to run at the expiration of the sentence imposed on count three; the sentence imposed on count five to begin to run at the expiration of the sentence imposed on

count four; the sentence imposed on count six to begin to run at the expiration of the sentence imposed on count five; the sentence imposed on count seven to begin to run at the expiration of the sentence imposed on count six; the sentence imposed on count eight to begin to run at the expiration of the sentence imposed on count seven; the sentence imposed on count nine to begin to run at the expiration of the sentence imposed on count eight, and the sentence imposed on count two to begin to run at the expiration or the sentence imposed on count nine; the sentence herein imposed on count two to begin to run at the expiration or termination of the sentence imposed by the Circuit Court of Ray County, Missouri, which the defendant is now serving in the Missouri State Penitentiary; the execution of the sentences imposed on counts six, seven, eight, nine and ten is suspended and the defendant is placed on probation, under the usual conditions, for the period of twenty five (25) years; the probation herein granted to begin to run at the expiration of the sentences imposed on counts two, three, four and five, or until said defendant is otherwise discharged as provided by law, without costs.

[fol. 8] It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment.

J. C. Collet, United States District Judge.

The Court recommends commitment to an institution of the penal type.

Approved as to form:

Thomas A. Costolow, Assistant United States Attorney.

No. 11,266

UNITED STATES

vs.

LONNIE AFFRONTI, Alias Lonnie Affrontia, Alias Lonnie A'Fronte

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on to
Defendant noted appeal on and released on
Did on)
Did not) elect to enter upon service of sentence.
Defendant's appeal determined on
Defendant surrendered on to
at , the institution designated by the Attorney General, together with certified copy of the within Judgment and Commitment.

—— ——, U. S. Marshal, By —— ——, Deputy.

[File endorsement omitted.]

[fol. 9] IN UNITED STATES DISTRICT COURT

MANDATE OF UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT—Filed November 4, 1944

UNITED STATES OF AMERICA, ss.:

The President of the United States of America,

To the Honorable Judges of the District Court of the United States for the Western District of Missouri.

(Seal.)

Greeting:

Whereas, lately in the District Court of the United States for the Western District of Missouri, before you, or some of you in a cause between the United States of America,

Plaintiff, and Lonnie Affronti, alias Lonnie Affrontia, alias Lonie A'Fronte, Defendant, No. 11266, wherein the judgment and sentence of the said District Court in said cause, entered on the 26th day of January, A. D. 1944, was in the following words, viz:

"On this 26th day of January, 1944, came the United States Attorney, and the defendant, Lonnie Affronti, alias Lonnie Affrontia, alias Lonnie A'Fronte, appearing in person, and by counsel, and

The defendant having been convicted on verdict of guilty of the offenses charged in counts, two, three, four, five, six seven, eight, nine and ten of the Indictment in the above entitled cause, to wit: unlawfully, wilfully, knowingly and feloniously sell morphine, a derivative of opium, not from the original stamped package and not in the original stamped package and upon which the tax had not been paid as required by law, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five (5) years [fol. 10] on each of counts two, three, four, five, six, seven, eight, nine and ten of the Indictment; the sentence imposed on count three to begin to run at the expiration of the sentence imposed on count two; the sentence imposed on count four to begin to run at the expiration of the sentence imposed on count three; the sentence imposed on count five to begin to run at the expiration of the sentence imposed on count four; the sentence imposed on count six to begin to run at the expiration of the sentence imposed on count five; the sentence imposed on count seven to begin to run at the expiration of the sentence imposed on count six; the sentence imposed on count eight to begin to run at the expiration of the sentence imposed on count seven; the sentence imposed on count nine to begin to run at the expiration of the sentence imposed on count eight; and the sentence imposed on count ten to begin to run at the expiration of the

sentence imposed on count nine; the sentence herein imposed on count two to begin to run at the expiration or termination of the sentence imposed by the Circuit Court of Ray County, Missouri, which the defendant is now serving in the Missouri State Penitentiary; the execution of the sentences imposed on counts six, seven, eight, nine and ten is suspended and the defendant is placed on probation, under the usual conditions, for the period of twenty-five (25) years; the probation herein granted to begin to run at the expiration of the sentences imposed on counts two, three, four and five, or until said defendant is otherwise discharged as provided by law, without costs.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the Commitment.

J. C. Collett, United States District Judge."

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals, Eighth Circuit, by virtue of an appeal, agreeably to the act of Congress, in such case made and provided, fully and at large appears;

[fol. 11] And whereas, at the September term, in the year of our Lord one thousand nine hundred and forty-four, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed, without costs to either party in this Court.

And it is further ordered by this Court that the defendant in the said District Court, Lonnie Affronti, do surrender himself to the custody of the United States Marshal for the Western District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

October 14, 1944.

You, therefore, are hereby commanded that such proceedings, be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Harlan F. Stone, Chief Justice of the United States, the 3rd day of November, in the year of our Lord one thousand nine hundred and forty-four.

E. E. Koch, Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

[Endorsed:] United States Court of Appeals. No. 12817. September Term, 1944. Lonnie Affronti, Appellant, vs. United States of America. Mandate.

[File endorsement omitted.]

[fol. 12] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO STAY EXECUTION OF SENTENCE AND MOTION TO MODIFY SENTENCE AND PLACE DEFENDANT ON PROBATION—Filed July 14, 1953

1. Comes now Lonnie Affronti and states to the Court that in 1937 he was arrested in the State of New York and there charged with carrying concealed weapon and that upon trial he was convicted and sentenced to serve a term of 7 to 14 years, which sentence was served within 5 years; that while confined in the Penitentiary in New York State he was indicted in the United States District Court in New York for possession of narcotics and, upon conviction there, received a term of 3 years; that the charges against him in connection with the carrying of concealed weapon grew out of a search which was made of the room where he was living and the weapon consisted of a revolver which was in a drawer of his dresser, and was not on his person as the charge would indicate; that said sentences in the State of New York have been fully served; that upon completion of the sentences in New York State he was released to the authorities of Ray County, Missouri and by them

brought back to the State of Missouri. He was tried in the Ray County Circuit Court charged with murder in the first degree. The verdict of the jury was guilty of murder in the second degree, for which he received a 10-year sentence, that said sentence was served in the Missouri State Penitentiary, and he was released to the custody of the United States Marshal on October 13, 1949 to start the service of the sentences received in this case.

2. Defendant states that while confined in the Missouri State Penitentiary for service of the sentence in the Ray County Circuit Court he was brought into this court under a writ of habeas corpus ad prosquendum to be tried on the indictment returned in this case, which was in 10 counts each of which charged the illegal sale of narcotics. The [fol. 13] Court directed a verdict of not guilty on the first count, and upon the remaining 9 counts defendant was found guilty. Whereupon, sentence was pronounced as follows: Defendant was sentenced to serve 5 years each on counts 2, 3, 4 and 5, said sentences to run consecutively with one another, and the service of the sentences to start upon completion of the sentence then being served in the Missouri State Penitentiary. After the service of said sentences defendant was then placed on [propation] for a period of 25 years.

3. Defendant states that the service of 5 years on Count 2 will soon have been completed, and he requests the Court to issue a stay of execution as to the remaining sentences.

4. Defendant has been in custody for a great many years. At each and every institution where he has been committed he has observed all rules and has earned good behavior time at each institution. Defendant believes that his debt to society has been paid, and assures the Court that if he is placed upon probation for the remaining sentences he will be a model citizen and will prove to the Court that the parole and probation systems are such as to assist a man in his position.

5. Defendant states that the time for his conditional release will not be reached until November 26, 1962; that if placed on probation at this time he will become gainfully employed as he has been offered employment; that the members of his family who live in Kansas City are all re-

spectable and law abiding citizens and will help and co-operate with him in every way.

6. This motion is directed to the sound discretion of the Court.

7. Defendant earnestly moves the Court to stay the execution of the remaining sentences herein and order the defendant placed on probation.

Harry F. Murphy, Attorney for Defendant Petitioner.

Copy of within motion served on United States Attorney this 14 day of July, 1952.

Harry F. Murphy.

[fol. 14] Suggestions in Support of Foregoing Motion

Rule 32, Federal Rules of Criminal Procedure:

By the terms of Rule 32(c) this Court may place defendant on probation.

[File endorsement omitted.]

In United States District Court

[Title omitted]

Memorandum and Order Overruling "Motion to Stay Execution of Sentence and Motion to Modify Sentence and Place Defendant on Probation—Filed November 18, 1954

Defendant is now confined in the Medical Center for Federal Prisoners at Springfield, Missouri, where he is serving the second of nine five-year sentences imposed to run consecutively, execution having been suspended upon the last five sentences and defendant placed on probation for twenty-five years, which sentences were imposed on the defendant in the United States District Court for the Western District of Missouri, Western Division at Kansas City, on January 26, 1944.

Defendant's motion seeks to have the unserved sentences suspended and the defendant placed on probation for the period of the unserved sentences. Defendant has spent the past seventeen years in prison; he served five years in

the State of New York under a sentence of from 7 to 14 years imposed on April 6, 1938, for carrying concealed weapons; he served a term of three years subsequent thereto, imposed on June 24, 1938, upon conviction for possession of narcotics.

Upon release, he was transferred to Missouri where he was tried and convicted and thereafter sentenced on May 22, 1943 to a period of ten years for murder in the Circuit Court of Ray County, Missouri; he was released on October [fol. 15] 14, 1949 from the Missouri State Penitentiary and transferred to Leavenworth, Kansas, to begin service of his present sentences.

In his motion the defendant contends that unless he is placed on probation for the remainder of the sentences imposed by this court, that he will not be eligible for release until November 26, 1962; further that his prison record is without blemish; that the interests of society have been served by the long period of confinement which has been imposed upon him, and that the best interests of justice will be served by placing him on probation for the remainder of the term of his sentences.

It had been the custom of this court until Phillips vs. U. S. 212 F. (2) 327 (decided May 4, 1954), in instances where, in the opinion of the court the best interests of justice would be served, to suspend the execution of a sentence, the service of which had not yet begun and place the defendant on probation for the remainder of such term, notwithstanding the fact that such defendant had begun the service of a sentence on a prior count imposed at the same term as the sentence which was later suspended.

Before the decision in Phillips vs. U. S. supra, apparently the courts in the Ninth and Tenth circuits had determined that such action was within the right of the court, but of course, the opinion in the Phillips case is binding upon this court. Kirk vs. U. S. 185 F. (2) 185 (9 Cir.); White vs. Steigleder, 37 F. (2) 858 (10 cir.).

Therefore, the defendant's Motion must be and is hereby overruled.

(Signed) R. M. Duncan, Richard M. Duncan, Chief Judge.

Dated: November 18, 1954.

[fol. 16] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed November 19, 1954

Appellant: Lonnie Affronti, U. S. Medical Center, Springfield, Missouri.

Appellant's Attorney: Harry F. Murphy, 806 Commerce Building, Kansas City, Missouri.

Offense: Sale of Narcotics, 10 Counts: Indictment.

Defendant has filed motion to stay execution of sentence of remaining counts of judgment yet to be served and to be placed on probation. This motion was overruled November 18, 1954.

Defendant is now confined at the U. S. Medical Center, Springfield, Missouri and has yet to serve two five year sentences, service of which commence at the expiration of sentence now being served.

I, the above named appellant, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the order overruling motion to suspend execution of sentence.

Dated at Kansas City, Missouri, November 18, 1954.

Lonnie Affronti, Appellant, by Harry F. Murphy, Attorney for Appellant.

Received copy of foregoing this 18th day of November, 1954.

Joseph L. Flynn, Assistant United States Attorney, Western District of Missouri.

[File endorsement omitted.]

Designation of Contents of Record—Filed November 19, 1954 (omitted in printing)

[fol. 17] [Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 18] IN UNITED STATES DISTRICT COURT

DOCKET ENTRIES

1932

April 30. Commissioner's transcript 9780.

Jan. 21. Indictment from Southwest Division filed. Order to issue capias and take $5000 bond filed.

April 30. Capias returned "non est" and filed.

May 21. Order for capias.

May 23. Order for capias, fixing bond at $5000, filed. Capias issued.

May 27. Capias with Marshal's return filed.

June 14. Order, setting aside order of May 23, forfeiting bond filed.

June 20. Petition for habeas corpus ad testificandum filed. Order for habeas corpus ad testificandum filed. Habeas corpus ad testificandum issued.

June 27. Defendant Affronti called three times but answers not. Surety called three times but answers not.

June 25. Bond of Defendant Affronti forfeited. Capias and scire facias ordered. Capias issued.

Nov. 25. Capias for Lonnie Affronti with Marshal's "non est" return filed.

1937

Oct. 18. Case dropped with leave to reinstate.

Dec. 31. Order, reinstating case filed. (As to Affronti)

1938

July 8. Case dropped with leave to reinstate.

1943

May 21. Order, reinstating case filed. Order for capias and bond, fixing bond at $10,000.00 to be taken by the nearest U. S. Commissioner, filed. Pluries capias issued and delivered to the Marshal.

[fol. 19] Aug. 23. Order for writ of habeas corpus ad prosequendum filed. Writ issued.

Sept. 7. Defendant Affronti is in court and declines counsel for purpose of arraignment. Defendant Affronti is arraigned and plea of not guilty entered. For trial October 18, 1943.

1943

Sept. 30. Writ of habeas corpus ad prosequendum returned and filed.

1944

Jan. 18. Petition and order for writ of habeas corpus ad prosequendum filed. Writ issued and delivered to the Marshal.

Jan. 24. Defendant appears with his counsel. By leave of Court defendant withdraws his plea of not guilty heretofore entered, and files demurrer to the indictment, which is taken up, considered and overruled. Defendant waives formal arraignment and enters a plea of not guilty. Both sides announce ready for trial, and jury is ordered, empanelled and sworn. Opening statements made. Government introduces testimony and rests. Defendant files motion for directed verdict as to each count; sustained as to count 1, and overruled as to counts 2 to 10, inclusive. Defendant rests. Arguments made and jury instructed and retires to consider of its verdict. Jury returns verdict of not guilty as to count 1, guilty as to counts 2 to 10, inclusive. Sentence deferred until Wednesday, January 26, 1944, at 4 o'clock P.M.

Jan. 26. Sentence: 5 years on each of counts 2 through 10 to be served consecutively, one after the other next prior; execution of the sentences on each of counts 6 through 10 suspended and defendant placed on probation for a period of 25 years to begin at the expiration of the sentences imposed on counts 2, 3, 4 and 5; without costs, [fol. 20] to run consecutively with sentence in Missouri State Penitentiary. Judgment and Commitment filed. Copies delivered to the Marshal.

Jan. 29. Notice of Appeal filed. Notice of Designation of Contents of Record on appeal filed.

Feb. 17. Application for extension of time to April 29, 1944, in which to file bill of exceptions and assignment of errors filed. Order, granting said application, filed. (Copy to Clerk, C. C. of A.)

Feb. 21. Pluries capias returned and filed. Writ of habeas corpus ad prosequendum filed.

Apr. 17. Bill of Exceptions filed.

Apr. 25. Assignment of Errors filed.

1944

Apr. 28. Transcript in appeal mailed to Clerk, U.S.C.C.A.

Nov. 4. Mandate of U.S.C.C.A. affirming judgment and sentence filed.

1949

Oct. 11. Motion of defendant to modify judgment filed. (Copy to U. S. Atty.)

Oct. 13. Order, directing the Marshal to produce defendant Affronti before this court on October 14, 1944, filed. (Copies delivered to the Marshal.)

Oct. 14. The defendant appears in open court with counsel, Mr. Otto Schmid. The motion of the defendant to modify judgment was argued, submitted to the Court, and by the Court overruled. (Judge Duncan)

Nov. 14. Judgment and Commitment, bearing Marshal's return showing defendant delivered to U. S. Penitentiary, Leavenworth, Kansas on October 14, 1949, filed.

1953

July 14. Motion to stay execution of sentence and motion to modify sentence and place defendant on probation, with [fols. 21-22] suggestions in support thereof filed. (File to Judge Duncan)

Nov. 12. Motion of defendant to stay execution of sentence etc., is argued submitted to the Court and by the Court taken under advisement.

1954

Nov. 18. Memorandum and order, overruling motion to stay execution of sentence and motion to modify sentence and placed defendant on probation, filed. (Copy to Harry F. Murphy, counsel for the defendant; copy to U. S. Attorney; copy to the Attorney General)

Nov. 19. Notice of Appeal from said ruling filed. Duplicate thereof and two certified copies of the docket entries mailed to the Clerk of U. S. Court of Appeals, St. Louis, Missouri.

[Clerk's Certificate to foregoing paper omitted in printing.]

[fol. 23] In United States Court of Appeals for the Eighth Circuit

No. 15,220

Lonnie Affronti, Appellant,

vs.

United States of America, Appellee

Appeal from the United States District Court for the Western District of Missouri

Opinion—April 13, 1955

Harry F. Murphy filed brief for Appellant.

Edward L. Scheufler, United States Attorney, and Kenneth C. West, Assistant United States Attorney, filed brief for Appellee.

Before Sanborn, Collet and Van Oosterhout, Circuit Judges

Sanborn, Circuit Judge:

The United States District Court for the Western District of Missouri on January 26, 1944, upon the verdict of [fol. 24] a jury finding the appellant guilty upon nine counts of a ten-count indictment charging illegal sales of narcotics, entered a judgment sentencing him to five years imprisonment under each of the nine counts, the sentences to be served consecutively. The judgment provided that he was to serve four of the five-year periods of imprisonment commencing after the termination of a sentence he was then serving in the Missouri State Penitentiary. The execution of the sentences imposed by the judgment under five of the nine counts of the indictment was suspended, and as to those sentences the appellant was placed on probation for the period of twenty-five years, the probation to commence after he had served the sentences execution of which was not suspended. He appealed from this judgment, which was affirmed by this Court in October of 1944. 145 F.2d 3.

The appellant was, on October 13, 1949, released from the Missouri State Penitentiary and transferred to the

United States Penitentiary at Leavenworth, Kansas, in execution of the judgment of the federal District Court, and has been in federal executive custody ever since.

In July of 1953 the appellant filed a motion in the District Court, stating that the service of the first of the five-year sentences or periods of imprisonment he was required to serve would soon be completed and asking that the execution of the remaining unserved sentences or periods of imprisonment be suspended, and that he be placed on probation.

The judge who had sentenced the appellant was no longer a member of the District Court. The motion was heard by Chief Judge Duncan of that court. In denying the motion, he said:

[fol. 25] "In his motion the defendant contends that unless he is placed on probation for the remainder of the sentences imposed by this court, that he will not be eligible for release until November 26, 1962; further that his prison record is without blemish; that the interests of society have been served by the long period of confinement which has been imposed upon him, and that the best interests of justice will be served by placing him on probation for the remainder of the term of his sentences.

"It had been the custom of this court until *Phillips* v. *United States*, 8 Cir., 212 F. 2d 327 (decided May 4, 1954), in instances where, in the opinion of the court the best interests of justice would be served, to suspend the execution of a sentence, the service of which had not yet begun and place the defendant on probation for the remainder of such term, notwithstanding the fact that such defendant had begun the service of a sentence on a prior count imposed at the same term as the sentence which was later suspended.

"Before the decision in *Phillips* v. *United States*, *supra*, apparently the courts in the Ninth and Tenth circuits had determined that such action was within the right of the court, but of course, the opinion in the *Phillips* case is binding upon this court. *Kirk* v. *United States*, 9 Cir., 185 F. 2d 185; *White* v. *Steigleder*, 10 Cir., 37 F. 2d 858."

We are now urged by counsel for appellant to overrule our decision in *Phillips* v. *United States*, 212 F. 2d 327,

and to follow the opinion of the Court of Appeals for the Ninth Circuit in *Kirk* v. *United States*, 185 F. 2d 185, which was relied upon in *Kelley* v. *United States*, 10 Cir., 209 F. 2d 638, and which he assures us correctly states the applicable law. While we regret that the *Phillips* case did not reach the Supreme Court on certiorari, nothing has been brought forward by the appellant which tends in any way to indicate that this Court's decision in the *Phillips* case was incorrect.

[fol. 26] As strongly indicating that the *Phillips* case was correctly decided, we note that Judge Chestnut, of the United States District Court for the District of Maryland, recently in two cases gave careful consideration to the question of the power of a District Court to grant a federal prisoner probation with respect to unserved portions of a cumulative sentence which was being served, *United States* v. *Stern*, 123 F. Supp. 118, 125, and *United States* v. *Bernett* (*United States* v. *Mann*), 123 F. Supp. 841, 844-847, and reached the same conclusion that was reached by this Court in the *Phillips* case,—declining, as this Court did, to follow the decision of the Ninth Circuit in the *Kirk* case. An appeal was taken to the Court of Appeals for the Fourth Circuit in each of the cases decided by Judge Chestnut, and his decisions were affirmed. *Stern* v. *United States*, 4 Cir., F. 2d , opinion filed February 2, 1955, and *Mann* v. *United States*, 4 Cir., 218 F. 2d 936.

The decision of this Court in the *Phillips* case is adhered to. It calls for the affirmance of the order appealed from.

The appellant may apply to the Supreme Court for certiorari without prepayment of further Clerk's fees or costs in this Court.

The order appealed from is affirmed.

Collet, Circuit Judge, dissents for the reasons stated by him in his dissenting opinion in the case of *Phillips* v. *United States*, 212 F. 2d 327, 336.

[fols. 27-28] IN UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15220

LONNIE AFFRONTI, Appellant,

vs.

UNITED STATES OF AMERICA

Appeal from the United States District Court for the Western District of Missouri

JUDGMENT—April 13th, 1955

This cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and on the briefs filed by counsel for the respective parties.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

[fols. 29-30] IN UNITED COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Title omitted]

ORDER RE PREPARATION OF RECORD AND STAYING ISSUANCE OF MANDATE—April 25, 1955

In the opinion of this Court filed April 13, 1955, it was provided that the defendant-appellant may apply to the Supreme Court of the United States for certiorari without prepayment of further Clerk's fees or costs in this Court, and it having been determined by counsel representing appellant to make such application. It is Ordered by this Court that the necessary record be prepared for filing in the Supreme Court with a petition for writ of certiorari without payment of fee therefore to the Clerk of this Court.

And it is further Ordered by this Court, on motion of counsel for appellant, that the issuance of the mandate in

this cause be, and it is hereby, stayed to and including May 20, 1955, and if petition for writ of certiorari is filed within thirty days from and after the date of the judgment of this Court, April 13, 1955, the mandate will then be held until final disposition of the case in the Supreme Court.

April 25, 1955.

[fols. 31-32] [Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 33] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 790

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed June 6, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2940-5)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. ~~700~~ 71

UNITED STATES OF AMERICA EX REL.
LONNIE AFFRONTI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

HARRY F. MURPHY,
806 Commerce Building,
Kansas City, Missouri,
Attorney for Petitioner.

E. L. MEIDENBAAL, INC., 924 WYANDOTTE, KANSAS CITY, MO., HARRISON 3030

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. .....

UNITED STATES OF AMERICA EX REL.
LONNIE AFFRONTI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Lonnie Affronti, respectfully petitions that a writ of certiorari issue out of this Court to review a final judgment of the United States Court of Appeals for the Eighth Circuit, entered April 13, 1955, at which time said Court affirmed the judgment of the United States District Court for the Western District of Missouri.

In its judgment dated November 18, 1954, the United States District Court for the Western District of Missouri

overruled motion filed by the defendant therein, which motion sought to have the execution of the unserved sentences suspended and the defendant placed on probation for the period of the unserved sentences. The District Court held that it was without jurisdiction to grant the motion following the decision of the United States Court of Appeals for the Eighth Circuit in *Phillips* v. *United States*, 212 F. 2d 327, rendered April 13, 1954.

OPINIONS BELOW.

The opinion of the District Court is printed in the record filed herein (R. 14). The opinion of the Court of Appeals has not been officially reported but follows page 21 of the Record filed herein.

JURISDICTION.

The opinion of the United States Court of Appeals for the Eighth Circuit was filed April 13, 1955. No petition for rehearing being filed the judgment became final. An order was made by that court staying the mandate until May 20, 1955, pending the filing of this petition for writ of certiorari.

Jurisdiction to review this case upon writ of certiorari is conferred upon this court by 28 U. S. C., Section 1254 (1) and 28 U. S. C., Section 2101, and Rule 19 of Supreme Court of the United States, Section 1 (b):

> (b) "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; * * *."

QUESTION PRESENTED.

The question presented by this petition is:

Does a District Court have the power to grant probation with respect to unserved portions of a cumulative sentence?

The opinion in this case recommends that the appellant be permitted to apply to this court without the prepayment of clerk's fees in the Court of Appeals.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

This case involved the following statutes:

28 U. S. C., Section 1254 (1).
28 U. S. C., Section 2101.
Rule 19, S. Ct. U. S., Section 1 (b).

STATEMENT OF THE MATTER INVOLVED.

Petitioner filed a motion in the District Court to stay the execution of the sentences yet not served.

On the 26th day of January, 1944, the petitioner, having been adjudged guilty of the charges against him in an indictment returned in that District, received the following sentences (R. 6):

> "The defendant having been convicted on verdict of guilty of the offenses in counts two, three, four, five, six, seven, eight, nine and ten of the Indictment in the above-entitled cause, to wit: unlawfully, knowingly and feloniously sell morphine, a derivative of opium, not from the original stamped package and not in the original stamped package and upon which

the tax had not been paid as required by law, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five (5) years on each of counts two, three, four, five, six, seven, eight, nine and ten of the Indictment; the sentence imposed on count three to begin to run at the expiration of the sentence imposed on count two; the sentence imposed on count four to begin to run at the expiration of the sentence imposed on count three; the sentence imposed on count five to begin to run at the expiration of the sentence imposed on count four; the sentence imposed on count six to begin to run at the expiration of the sentence imposed on count five; the sentence imposed on count seven to begin to run at the expiration of the sentence imposed on count six; the sentence imposed on count eight to begin to run at the expiration of the sentence imposed on count seven; the sentence imposed on count nine to begin to run at the expiration of the sentence imposed on count eight, and the sentence imposed on count ten to begin to run at the expiration of the sentence imposed on count nine; the sentence herein imposed on count two to begin to run at the expiration or termination of the sentence imposed by the Circuit Court of Ray County, Missouri, which the defendant is now serving in the Missouri State Penitentiary; the execution of the sentences imposed on counts six, seven, eight, nine and ten is suspended and the defendant is placed on probation under the usual conditions, for the period of twenty five (25) years; the probation herein granted to begin to run at the expiration of the sentences imposed on counts two, three, four and five, or until said defendant is

otherwise discharged as provided by law without costs."

The petitioner commenced the service of the sentences aforesaid on October 14, 1949 (R. 20).

The motion filed in the District Court on July 14, 1953, seeking to have the execution of the remaining sentences suspended and the petitioner placed on probation, was filed during the service of the first of the five year sentences, leaving at that time three of the five year sentences to be served.

Previous to the ruling on the motion aforesaid, the United States Court of Appeals had affirmed the United States District Court for the Western District of Missouri in *Melvin H. Phillips, Appellant, v. United States of America, Appellee*, 212 F. 2d 327. As in this case, Judge Collet filed a dissenting opinion. The facts in that case are identical with those in this case.

Due to the conflict of that opinion with the opinion by the United States Court of Appeals for the Ninth Circuit in *Kirk* v. *United States*, 185 F. 2d 185, the Court in the Phillips case recommended that the defendant Phillips might petition for certiorari without the prepayment of clerk's fees or costs in that court. Defendant Phillips did not apply for certiorari to this court.

Since the Phillips and the Kirk cases, the United States Court of Appeals for the Tenth Circuit, in *Kelley* v. *United States*, 209 F. 2d 638, has followed the ruling of the Ninth Circuit in the Kirk case. We find that the Phillips decision has been followed by the Fourth Circuit in *Stern* v. *United States*, 219 F. 2d 263, and *Mann* v. *United States*, 218 F. 2d 936.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The question presented in this petition has reached four different circuits in the United States Court of Appeals, but has not been passed upon by this court.

The Fourth Circuit and the Eighth Circuit are in agreement and the contrary opinion finds an agreement between the Ninth and the Tenth Circuits.

It is conceivable that prisoners serving time in the same institution from different districts might be treated differently due to rulings of the Courts of Appeals in which their districts are located. The petitioner, Affronti, now confined to the United States Medical Center for Federal Prisoners, at Springfield, Missouri, has been told that the United States District Court for the Western District of Missouri cannot entertain his motion in which he seeks to have the execution of the sentences yet to be served suspended, whereas a cell mate whose district is in either the Ninth or Tenth Circuits could have such a motion sustained.

In order to reach a clear understanding of the problem presented in this petition, it is necessary to review the jurisdiction of the sentencing courts to suspend or place on probation persons convicted before them. The Circuit Court of Appeals, Ninth Circuit, recognized the importance of such a step in *Weber* v. *Squire*, 124 F. 2d 618 (Cert. denied 62 S. Ct. 800), when it stated the following:

> "To understand the issue it will be well to recall that power of the District Court to suspend sentences and to release a convicted person under probation, although long assumed by the U. S. District Courts, was held without basis in law by *Ex parte United States*, 1916, 242 U. S. 27, 37 S. Ct. 72, 61 L. Ed. 129, L. R. A. 1917E, 1178 Ann. Cas. 1917B, 355.

"Thereafter a probationary system for U. S. Courts became law by the Act of March 4, 1925, c. 521, 43 Stat. 1259, 18 U. S. C. A., Sec. 724."

Thus, Congress, when shown a graphic illustration of the need for legislation granting the courts further jurisdiction and powers of probation by the decision in *Ex parte United States, supra*, enacted Title 18, U. S. C. A. 724, now Title U. S. C. A., Sec. 3651, which reads, in part, as follows:

"Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition of execution of sentence and place the defendant on probation for such period and upon such terms and condtions as the court deems best."

The federal courts have, in many instances, interpreted the foregoing legislation in regard to the question of what limitations of time are to be placed on the courts in exercising their jurisdiction under the Act. The following quotation from *Pernatto* v. *United States*, (C. C. A., 9th Cir.) 107 F. 2d 372, best outlines the court's interpretation of the Act in respect to time. Quoting from the case of *Weiss* v. *United States*, 28 F. Supp. 598, the Court of Appeals in the *Pernatto case, supra*, stated:

"It will be observed that the power to suspend the execution of sentence given by the act is not expressly limited to the time of imposition of sentence or to the term within which sentence is imposed. On the contrary, it seems clear that it was the intention of the Congress in enacting this remedial and humanitarian legislation that the power to suspend the execution of a sentence should continue until its execution has actually commenced. It has been so held by all four

Circuit Courts of Appeals in which the question has arisen. *Nix* v. *James*, 9 Cir., 7 F. 2d 590; *Kriebel* v. *United States*, 7 Cir., 10 F. 2d 762; *Evans* v. *District Judge*, 6 Cir., 12 F. 2d 64; *Ackerson* v. *United States*, 2 Cir., 15 F. 2d 268. It is true that the Supreme Court held in *United States* v. *Murray*, 275 U. S. 347, 48 S. Ct. 146, 72 L. Ed. 309, that the power is gone once execution of the sentence commences. It was not suggested in that case, however, that the power must be exercised at the time of imposition of sentence or within the term. On the contrary Chief Justice Taft took occasion to point out that the rulings of the four Circuit Courts of Appeals to which I have referred were not inconsistent with his opinion.

"It must be remembered, as Judge Anderson pointed out in *Kriebel* v. *United States, supra*, that the rule laid down in *United States* v. *Mayer*, 235 U. S. 55, 35 S. Ct. 16, 59 L. Ed. 129, to the effect that a federal district court has no power to set aside or alter a sentence after the expiration of the term at which it was imposed, unless the proceeding for that purpose was begun during that term, does not apply to an application to suspend the execution of a judgment. This is for the reason, as was held in *United States* v. *Pile*, 130 U. S. 280, 9 S. Ct. 523, 32 L. Ed. 904, that an order suspending the execution of a sentence does not operate to set it aside. Under such circumstances the sentence remains in full force, its execution merely being suspended."

Note the distinction made in the above-quoted opinion between altering or setting aside and suspending execution of sentences.

It is extremely important to keep the distinction between altering or setting aside and suspending in mind. Rule 35 of the Federal Rules of Criminal Procedure, Title 18, U. S. C. A., deals with correction or reduction of sentence, but its very title and substance and its purpose is to

introduce a "flexible time limitation on the power of the court to reduce a sentence, in lieu of the present limitation of the term of court." Title 18, U. S. C. A., Notes of Advisory Committee on Rules, Sec. 396.

> "A prisoner serving the first of several consecutive sentences is not serving the other sentences."
>
> *McNally* v. *Hill (Warden)*, 293 U. S. 131.
>
> *Crow* v. *U. S.*, 186 F. 2d 704 (C. C. A. 9th Cir.).

The above point is the focal point of the argument.

Originally the Supreme Court of the United States took the position in *United States* v. *Greenhaus*, (1937) (C. C. A. 2, 1937) 85 F. 2d 116, Certiorari denied 299 U. S. 596, that where consecutive sentences were imposed upon different counts of the same indictment, the court could not grant probation and suspend execution of sentence conditional upon the execution of a prior sentence. However, in the same year, a case from the *same* circuit based on the same facts, the Supreme Court held that the District Court, under the Probation Act, had the power to suspend the imposition of sentence on one indictment and grant probation for a period to begin upon completion of execution of sentence on another indictment before the court at the same time. *Frad* v. *Kelly*, (1937) 302 U. S. 312.

Thereafter, in the case of *Casman* v. *U. S.*, 303 U. S. 617, the Supreme Court reversed the Circuit Court of Appeals for the 2nd Circuit (94 F. 2d 1020), which has decided the case on the authority of the *Greenhaus case, supra*, on the grounds of *Frad* v. *Kelly, supra.*

Subsequently, in *Weber* v. *Squier, supra*, the court, at page 621, stated:

> "Since the doctrine of the Greenhaus case appears to be overruled and disapproved there was nothing wrong with the District Court's order in the instant

case in sentencing petitioner to the penitentiary upon one count and at the same time sentencing him and suspending sentence under a period of probation under another count of the same indictment."

Herein lies the distinction between the case of *United States* v. *Murray, supra,* and *Bradford* v. *U. S., supra,* and this case. In the instant case we have nine separate sentences and nine separate counts. In the *Murray case, supra,* there was a single sentence upon which service had commenced, and the issue decided in that case was that a district judge cannot place a prisoner on probation after service of his sentence has begun. The petitioner herein is presently serving the sentence on Count 3 of the indictment. The motion which the District Court denied, asking for suspension of sentences in the instant case, goes to the sentences imposed on Counts 4 and 5, not the sentence being served presently under Count 3.

The *Bradford case, supra,* dealt with the question of the right to change a sentence *after* service thereof had commenced, which question was labeled unauthorized in the *Murray case, supra,* and has no bearing on the case at bar.

Thus we close the circle, arriving at our principal point, namely, "A prisoner serving the first of several consecutive sentences is not serving the other sentences." *Cran* v. *U. S., supra; McNally* v. *Hill, supra, U. S.* v. *Thompson,* 175 F. 2d 140.

In his dissenting opinion in the *Phillips Case,* Judge Collet said, 212 F. 2d 327):

"It is suggested that the revisers of Title 18 of the Code did not intend that the functions of the judiciary relating to probation should overlap or conflict with the functions of the executive branch of the govern-

ment with reference to custody and good time. The inference appears to be that from the revision should be read into the law a purpose to limit the long-established practice of pronouncing separate sentences for the purpose of reserving jurisdiction to suspend one or more later if the facts warrant. But, as stated in *Kelley* v. *United States*, 209 F. 2d 639 (10 Cir.), decided January 27, 1954, wherever a substantive change was intended by the revision, the reviser's notes so indicate. The reviser's notes indicate that there was no intention to change the power of the courts to suspend sentence and grant probation at any time before the service of the sentence begins. *Kirk* v. *United States*, 185 F. 2d 185 (9 Cir.); *Kelley* v. *United States*, *supra*. Hence, the crux of the present question is whether sentences which are separate and distinct at the time of original sentence automatically and irrevocably become one indivisible general sentence immediately upon the commencement of the service of the first. Or, as stated in the majority opinion, do the sentences, conceded to be separate and several at the time of imposition for purposes of probation, become 'for purposes of custody, the exact equivalent of a general sentence of imprisonment for the same number of years'? To warrant that assumption it is necessary to assume that the power of probation is abruptly and automatically shut off by incarceration on an antecedent sentence and custody is the only remaining function to be performed. That assumption is not sound, yet it is made the ground for denying any remaining power in the courts over sentences not yet begun. That, of course, is the exact purpose and effect of the majority opinion. But it seems to me that to give the Act such a narrow construction is unwarranted and not consistent with recognized rules of statutory construction of remedial legislation.

And it is to be said that the retention of the power later to suspend a sentence the execution of which has not yet begun, will cause harassment of the District Courts the answer is that those courts may, in a case

free from doubt as to the proper duration of imprisonment, impose a general sentence on all counts and forever bar any application for suspension and probation as to any part after its service has begun. But if the court is in doubt, and that must inevitably be the case in many instances, it should have the power, as it has been done in the past, to pronounce separate sentences of imprisonment and thereby reserve the power later to suspend one or more, the service of which has not yet begun. In the latter cases the District Courts have the absolute discretion to hear or not to hear applications for probation with or without the presence of the defendant. And their refusal or consent to do so, and their action in granting or refusing to grant probation on the merits of each case, are not subject to appellate compulsion or review. *United States* v. *Williams*, 12 F. 2d 65.

The original Probation Act by implication and the amended Act explicitly give the power to the courts to pronounce separate sentences. Under the original Act, the power and jurisdiction of the courts over probation extend to the time of the beginning of the execution of the several sentences. That power is not changed by the revision. Probation is by statute a judicial, not an executive function. There is nothing in the original Act or the revised Code which indicates a legislative intent automatically to divest the courts of jurisdiction over probation as to a sentence not commenced, when the custody of a defendant is vested in the executive on another sentence. And there is nothing in the Code which requires a merger of all sentences into one and a figurative transfer of jurisdiction over probation from the courts to the penal authorities as to sentences not yet commenced. In my opinion the majority opinion does that, without legislative sanction."

From the foregoing it is clear that there is an irreconcilable conflict in the decisions of the four Circuits.

Wherefore, your petitioner respectfully prays that, for the reasons herein set forth, a writ of certiorari be issued

to the United States Court of Appeals for the Eighth Circuit to the end that this case may be reviewed and determined by this Court, that the judgment of said Court of Appeals may be reversed by this court; and that your petitioner may have such other and further relief in the premises as may seem just and propr.

Lonnie Affronti,
Springfield, Missouri,
Petitioner.

HARRY F. MURPHY,
806 Commerce Building,
Kansas City, Missouri,
Attorney for Petitioner.

APPENDIX.

Text of Statutes Involved.

28 U. S. C. Section 1254.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U. S. C., Section 2101:

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court, on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.

Rule 19 U. S. Supreme Court, Section 1 (b):

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter * * *."

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,220.

Lonnie Affronti, Appellant, vs. United States of America, Appellee.	Appeal from the United States District Court for the Western District of Missouri.

[April 13, 1955.]

Harry F. Murphy filed brief for Appellant.

Edward L. Scheufler, United States Attorney, and Kenneth C. West, Assistant United States Attorney, filed brief for Appellee.

Before SANBORN, COLLET and VAN OOSTERHOUT, Circuit Judges.

SANBORN, Circuit Judge.

The United States District Court for the Western District of Missouri on January 26, 1944, upon the verdict of a jury finding the appellant guilty upon nine counts of a ten-count indictment charging illegal sales of narcotics, entered a judgment sentencing him to five years imprisonment under each of the nine counts, the sentences to be served consecutively. The judgment provided that he was to serve four of the five-year periods of imprisonment commencing after the termination of a sentence he was then serving in the Missouri State Penitentiary. The execution of the sentences imposed by the judgment under

five of the nine counts of the indictment was suspended, and as to those sentences the appellant was placed on probation for the period of twenty-five years, the probation to commence after he had served the sentences execution of which was not suspended. He appealed from this judgment, which was affirmed by this Court in October of 1944. 145 F. 2d 3.

The appellant was, on October 13, 1949, released from the Missouri State Penitentiary and transferred to the United States Penitentiary at Leavenworth, Kansas, in execution of the judgment of the federal District Court, and has been in federal executive custody ever since.

In July of 1953 the appellant filed a motion in the District Court, stating that the service of the first of the five-year sentences or periods of imprisonment he was required to serve would soon be completed, and asking that the execution of the remaining unserved sentences or periods of imprisonment be suspended, and that he be placed on probation.

The judge who had sentenced the appellant was no longer a member of the District Court. The motion was heard by Chief Judge Duncan of that court. In denying the motion, he said:

> "In his motion the defendant contends that unless he is placed on probation for the remainder of the sentences imposed by this court, that he will not be eligible for release until November 26, 1962; further that his prison record is without blemish; that the interests of society have been served by the long period of confinement which has been imposed upon him, and that the best interests of justice will be served by placing him on probation for the remainder of the term of his sentences.

"It had been the custom of this court until *Phillips* v. *United States*, 8 Cir., 212 F. 2d 327 (decided May 4, 1954), in instances where, in the opinion of the court the best interests of justice would be served, to suspend the execution of a sentence, the service of which had not yet begun and place the defendant on probation for the remainder of such term, notwithstanding the fact that such defendant had begun the service of a sentence on a prior count imposed at the same term as the sentence which was later suspended.

"Before the decision in *Phillips* v. *United States*, *supra*, apparently the courts in the Ninth and Tenth circuits had determined that such action was within the right of the court, but of course, the opinion in the *Phillips* case is binding upon this court. *Kirk* v. *United States*, 9 Cir., 185 F. 2d 185; *White* v. *Steigleder*, 10 Cir., 37 F. 2d 858."

We are now urged by counsel for appellant to overrule our decision in *Phillips* v. *United States*, 212 F. 2d 327, and to follow the opinion of the Court of Appeals for the Ninth Circuit in *Kirk* v. *United States*, 185 F. 2d 185, which was relied upon in *Kelley* v. *United States*, 10 Cir., 209 F. 2d 638, and which he assures us correctly states the applicable law. While we regret that the *Phillips* case did not reach the Supreme Court on certiorari, nothing has been brought forward by the appellant which tends in any way to indicate that this Court's decision in the *Phillips* case was incorrect.

As strongly indicating that the *Phillips* case was correctly decided, we note that Judge Chestnut, of the United States District Court for the District of Maryland, recently in two cases gave careful consideration to the question of the power of a District Court to grant a federal prisoner probation with respect to unserved portions of a cumulative sentence which was being served, *United States* v. *Stern*, 123 F. Supp. 118, 125, and *United States* v. *Ber-*

nett (*United States* v. *Mann*), 123 F. Supp. 841, 844-847, and reached the same conclusion that was reached by this Court in the *Phillips* case,—declining, as this Court did, to follow the decision of the Ninth Circuit in the *Kirk* case. An appeal was taken to the Court of Appeals for the Fourth Circuit in each of the cases decided by Judge Chestnut. and his decisions were affirmed. *Stern* v. *United States*, 4 Cir., ____ F. 2d ____, opinion filed February 2, 1955, and *Mann* v. *United States*, 4 Cir., 218 F. 2d 936.

The decision of this Court in the *Phillips* case is adhered to. It calls for the affirmance of the order appealed from.

The appellant may apply to the Supreme Court for certiorari without prepayment of further Clerk's fees or costs in this Court.

The order appealed from is affirmed.

COLLET, Circuit Judge, dissents for the reasons stated by him in his dissenting opinion in the case of *Phillips* v. *United States*, 212 F. 2d 327, 336.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 71.

LONNIE AFFRONTI, PETITIONER,

VS.

UNITED STATES OF AMERICA.

BRIEF OF PETITIONER.

HARRY F. MURPHY,
806 Commerce Building,
Kansas City, Missouri,
Attorney for Petitioner.

E. L. MIDDENHALL, INC., 924 WYANDOTTE, KANSAS CITY, MO., HARRISON 3030

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 71.

LONNIE AFFRONTI, PETITIONER,

VS.

UNITED STATES OF AMERICA.

BRIEF OF PETITIONER.

The opinion of the United States Court of Appeals for the Eighth Circuit is found in *Affronti* v. *United States*, 321 F. 2d 150.

Certiorari was granted by this court on June 6, 1955, 349 U. S. 151.

JURISDICTION.

The jurisdiction of this court is invoked by reason of conflict of opinion as to the power of the district courts to suspend execution of sentences after the service of part of which has commenced. (9 Cir.) *Kirk* v. *United States*, 185 F. 2d 185, and (10 Cir.) *Kelley* v. *United States*, 209 F. 2d 639, both holding contrary to *Phillips* v. *United States*, 212 F. 2d 327 (8 Cir.). (8 Cir.) *Affronti* v. *United States*, 321 F. 2d 150; (4 Cir.) *Mann* v. *United States*, 283 F. 2d 936; and (4 Cir.) *Stern* v. *United States*, 219 F. 2d 936.

QUESTION PRESENTED.

Does a District Court have power to grant probation with respect to cumulative sentences, service of part of which has been commenced?

STATEMENT.

The Petitioner, Lonnie Affronti, was indicted by a Federal Grand Jury in the District Court of the United States for the Western District of Missouri, which indictment was returned January 1, 1932, and in ten counts charged him with violation of the Narcotic laws then in effect (R. 1-5).

Twelve years later, January 24, 1944, he was brought to trial before a jury in Kansas City (R. 17). On January 26, 1944, the verdict of the jury found him not guilty as to Count One but guilty as to Counts two to ten, inclusive (R. 17).

The judgment and commitment (R. 6) entered on January 26, 1944, committed Affronti to the custody of the Attorney General "for the period of five years on each of Counts two, three, four, five, six, seven, eight, nine and ten of the Indictment; the sentence imposed on count three to begin to run at the expiration of the sentence imposed on count two; the sentence imposed on count four to begin to run at the expiration of the sentence imposed to run on count three; the sentence imposed on count five to begin to run at the expiration of the sentence imposed on count four; the sentence imposed on count six to begin to run at the expiration of the sentence imposed on count five; the sentence imposed on count seven to begin to run at the expiration of the sentence imposed on count six; the sentence imposed on count eight to begin to run at

the expiration of the sentence imposed on count seven; the sentence imposed on count nine to begin to run at the expiration of the sentence imposed on count eight; and the sentence imposed on count ten to begin to run at the expiration of the sentence imposed on count nine; the sentence herein imposed on count two to begin to run at the expiration or termination of the sentence imposed by the Circuit Court of Ray County, Missouri, which the defendant is now serving in the Missouri State Penitentiary; the execution of the sentences imposed on counts six, seven, eight, nine and ten is suspended and the defendant is placed on probation, under the usual conditions, for the period of twenty-five (25) years; the probation herein granted to begin to run at the expiration of the sentences imposed on counts two, three, four and five, or until said defendant is otherwise discharged as provided by law, without costs."

Upon appeal the judgment was affirmed on October 14, 1944 (*Affronti* v. *U. S.*, 145 F. 2d 3).

The Petitioner did not commence the service of the foregoing sentences until November 14, 1949 (R. 18).

On July 14, 1953, the Petitioner filed in the District Court a Motion to Stay Execution of Sentence and Motion to Modify Sentence and Place Defendant on Probation (R. 11, 12 and 13).

On November 18, 1954, the above motions were overruled by Judge R. M. Duncan and the memorandum filed by Judge Duncan on that date (R. 13 and 14) bases his decision upon the opinion rendered in *Phillips* v. *United States*, 212 F. 2d 327.

Upon appeal to the United States Court of Appeals for the Eighth Circuit, the judgment of the District Court was affirmed, *Affronti* v. *United States*, 321 F. 2d 150.

ARGUMENT.

The question presented has reached four different circuits in the United States Court of Appeals, but has not been passed upon by this court.

The Fourth Circuit and the Eighth Circuit are in agreement and the contrary opinion finds an agreement between the Ninth and the Tenth Circuits.

It is conceivable that prisoners serving time in the same institution from different districts might be treated differently due to rulings of the Courts of Appeals in which their districts are located. The petitioner, Affronti, now confined to the United States Medical Center for Federal Prisoners, at Springfield, Missouri, has been told that the United States District Court for the Western District of Missouri cannot entertain his motion in which he seeks to have the execution of the sentences yet to be served suspended, whereas a cell mate whose district is in either the Ninth or Tenth Circuits could have such a motion sustained.

In order to reach a clear understanding of the problem presented it is necessary to review the jurisdiction of the sentencing courts to suspend or place on probation persons convicted before them. The Circuit Court of Appeals, Ninth Circuit, recognized the importance of such a step in *Weber* v. *Squier*, 124 F. 2d 618 (Cert. denied 62 S. Ct. 800), when it stated the following:

> "To understand the issue it will be well to recall that power of the District Court to suspend sentences and to release a convicted person under probation, although long assumed by the U. S. District Courts, was held without basis in law by *Ex parte United States*,

1916, 242 U. S. 27, 37 S. Ct. 72, 61 L. Ed. 129, L. R. A. 1917E, 1178 Ann. Cas. 1917B, 355."

Thereafter Congress enacted Title 18, U. S. C. A. 724, now Title 18, U. S. C. A., Sec. 3651, which reads, in part, as follows:

> "Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition of execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best."

The federal courts have, in many instances, interpreted the foregoing legislation in regard to the question of what limitations of time are to be placed on the courts in exercising their jurisdiction under the Act. The following quotation from *Pernatto* v. *United States,* (C. C. A., 9th Cir.) 107 F. 2d 372, outlines the court's interpretation of the Act in respect to time. Quoting from the case of *Weiss* v. *United States,* 28 F. Supp. 598, the Court of Appeals in the *Pernatto case, supra,* stated:

> "It will be observed that the power to suspend the execution of sentence given by the act is not expressly limited to the time of imposition of sentence or to the term within which sentence is imposed. On the contrary, it seems clear that it was the intention of the Congress in enacting this remedial and humanitarian legislation that the power to suspend the execution of a sentence should continue until its execution has actually commenced. It has been so held by all four Circuit Courts of Appeals in which the question has arisen. *Nix* v. *James,* 9 Cir., 7 F. 2d 590; *Kriebel* v. *United States,* 7 Cir., 10 F. 2d 762; *Evans* v. *District*

Judge, 6 Cir., 12 F. 2d 64; *Ackerson* v. *United States*, 2 Cir., 15 F. 2d 268. It is true that the Supreme Court held in *United States* v. *Murray*, 275 U. S. 347, 48 S. Ct. 146, 72 L. Ed. 309, that the power is gone once execution of the sentence commences. It was not suggested in that case, however, that the power must be exercised at the time of imposition of sentence or within the term. On the contrary Chief Justice Taft took occasion to point out that the rulings of the four Circuit Courts of Appeals to which I have referred were not inconsistent with his opinion.

"It must be remembered, as Judge Anderson pointed out in *Kriebel* v. *United States, supra*, that the rule laid down in *United States* v. *Mayer*, 235 U. S. 55, 35 S. Ct. 16, 59 L. Ed. 129, to the effect that a federal district court has no power to set aside or alter a sentence after the expiration of the term at which it was imposed, unless the proceeding for that purpose was begun during that term, does not apply to an application to suspend the execution of a judgment. This is for the reason, as was held in *United States* v. *Pile*, 130 U. S. 280, 9 S. Ct. 523, 32 L. Ed. 904, that an order suspending the execution of a sentence does not operate to set it aside. Under such circumstances the sentence remains in full force, its execution merely being suspended."

It is extremely important to keep the distinction between altering or setting aside and suspending in mind. Rule 35 of the Federal Rules of Criminal Procedure, Title 18, U. S. C. A., deals with correction or reduction of sentence, but its very title and substance and its purpose is to introduce a "flexible time limitation on the power of the court to reduce a sentence, in lieu of the present limitation of the term of court." Title 18, U. S. C. A., Notes of Advisory Committee on Rules, Sec. 396.

"A prisoner serving the first of several consecutive sentences is not serving the other sentences."
McNally v. *Hill (Warden)*, 293 U. S. 131.
Crow v. *U. S.*, 186 F. 2d 704 (C. C. A. 9th Cir.).

In those cases defining the inherent jurisdiction and power of the courts to reduce sentences during the term, no problem of statutory interpretation is involved as in those cases measuring the powers conferred upon the courts by the Probation Act. And in construing the Probation Act we are not concerned with the inherent powers of the Court to reduce sentences because (1) Congress has whatever power is needed to confer the authority granted to the courts in the Probation Act, and (2) probably the granting of probation and suspension of execution of sentence does not "set aside or alter" the sentence, as seems to have been conceded in *Nix* v. *James, supra; Kriebel* v. *United States*, (C. C. A. 7, 1926) 10 F. 2d 762.

This court failed to make the distinction between the two categories of cases when, in the leading case of *United States* v. *Murray, supra*, construing the powers conferred upon the courts by the Probation Act, in its opinion at page 258 stated:

"* * * The beginning of the execution of sentence in a criminal case ends the power of the court even in the same term to change it. *Ex parte Lange*, 18 Wall. 165 * * *."

Later, in the case of *United States* v. *Benz, supra*, the power of the District Court to reduce a sentence during the term but after the commencement of sentence was being questioned. And this court, after referring to the above quoted language from the Murray case, at page 309 of the Benz opinion; stated:

"* * * The Murray case involved the construction of the Probation Act, not the general powers of the

Court over its judgments. The words quoted were used by way of illustration bearing upon the Congressional intent. That they state the rule more broadly than the Lange case warrants is apparent from the foregoing review of that case * * *."

Thus while cases not involving the Probation Act now clearly sustain inherent powers of the District Courts to reduce valid sentences during the term and regardless of the commencement of execution of sentence, it is equally clear in cases involving the authority conferred upon the District Courts by the Probation Act that regardless of the status of the term of court the commencement of the execution of sentence by even one day deprives the Court of the authority conferred by the Probation Act.

The reasoning of the Murray opinion followed the Court's reasoning in *Ex parte United States*, *supra*, in holding that except as provided by the Probation Act District Courts at no time had authority to suspend execution of sentence.

In the Murray opinion this court referred to a report from the Judiciary Committee on a prior attempt to enact Probation Legislation, and referred to the parole powers of the Board of Parole and the powers of clemency of the President under the Constitution. Then the Court reasoned that in view of the parole and clemency powers, Congress must not have intended in the Probation Act to extend the power of the courts during the entire period until the complete expiration of the sentence. And the Court stated, at page 357:

"A more reasonable construction is to reconcile the provisions for probation, parole and executive clemency, making them as little of a repetition as we can."

The reasoning and language of the Murray opinion seemed to exclude from the benefits of the Probation Act any former prisoner and anyone for whom any prison time under any sentence was contemplated.

Thus where consecutive sentences were imposed upon different counts of the same indictment it was later held that the Court could not grant probation and suspend execution of sentence conditional upon the serving of a prior sentence.

> *United States* v. *Greenhaus*, (C. C. A. 2, 1937) 85 F. 2d 116, cert. denied 299 U. S. 596, 57 S. Ct. 192, 81 L. Ed. 439.

In the Greenhaus case the Court referred to the Murray case and its reasoning and stated, at page 117:

> "* * * Following the reasoning of that decision, it has been held that where sentence is suspended and probation follows it cannot be made conditional on serving a prior sentence * * *."

However later in the case of *Frad* v. *Kelly*, (1937) 302 U. S. 312, 58 S. Ct. 188, 82 L. Ed. 282, this court had before it on certiorari to the Court of Appeals for the Second Circuit, a set of facts which differed from the Greenhaus case only in that the sentences were imposed under separate indictments tried together. And the court held, without mentioning the Greenhaus case, that the District Court had the power under the Probation Act to suspend the imposition of sentence on one indictment and grant probation for a period to begin upon completion of execution of sentence on another indictment before the Court at the same time.

Later the Court of Appeals for the Second Circuit had before it a set of facts similar to the facts in the Greenhaus case, viz., separate sentences on the same counts of an

indictment, and the Court of Appeals for the Second Circuit, in the case of *United States* v. *Cosman*, (C. C. A. 2) 94 F. 2d 1020, decided the matter in a *per curiam* opinion solely on the authority of the Greenhaus case, and was reversed by this court in *Cosman* v. *United States*, (1938) 303 U. S. 617, 58 S. Ct. 527, 82 L. Ed. 1083, decided by the court *per curiam* on the theory of *Frad* v. *Kelly*, *supra*.

Thereafter, the Court of Appeals, after thoroughly reviewing the cases, clearly interpreted the present law in its ruling in *Weber* v. *Squier*, *supra*, where the Court, at page 621, stated:

> "Since the doctrine of the Greenhaus case appears to be overruled and disapproved there was nothing wrong with the District Court's order in the instant case in sentencing petitioner to the penitentiary upon one count and at the same time sentencing him and suspending sentence under a period of probation under another count of the same indictment."

In view of the above cases it is now clear that for the purposes of the Probation Act consecutive sentences imposed on counts of the same indictment are not to be considered as a single sentence. So the commencement of execution of one sentence does not deprive the Court of its authority to exercise probationary power over the other sentences with respect to which the Court has, prior to the commencement of the execution of any of the sentences, granted probation and suspended execution of sentence.

Therefore, if the proposed future exercise of probationary power by the Court under such circumstances does not so conflict with the executive prerogative as to bring the case within the limitation prescribed by *United States* v. *Murray*, *supra*, then the mere act of the Court during the execution of the prior sentence in granting such probation and ordering suspension of execution of sentence

similarly does not conflict with the executive authority so as to bring the instant case within the probation of the Murray case. It has been so held with respect to consecutive sentences imposed in different districts under different indictments.

United States ex rel. Edelson v. *Thompson, supra.*

It is further submitted that the act of granting probation and suspending execution of sentence can only materially conflict with the executive authority where such act of the Court attempts to effect at the time of the Court's order the release of a prisoner from the custody of the Executive Department.

The granting of probation to the petitioner herein and suspending the execution of his sentences on the counts which he has not commenced to serve would not conflict with the authority conferred upon the Board of Parole. As a matter of fact, the petitioner is seeking relief herein because he is not yet eligible for parole.

In the case of *White* v. *Steigleder, supra,* the Court was confronted with the problem present in the Greenhaus case. The Court of Appeals for the Tenth Circuit, in determining that the trial court has the power to grant probation, stated at page 859:

> "It is urged that appellee is not entitled to the benefits of probation, because he was imprisoned some four months before he was released by a supersedeas bond on his appeal. We doubt if the fact in such a case would affect a right to probation, the convictions not having reached finality. But the fact does not appear in the record. And assuming there was a partial service of the sentence, it was necessarily for the separate offense charged in count I of the indictment and not for the different offenses charged in the remaining counts wherein sentence was deferred until the expi-

ration of sentence on the first count. Clearly, sentence has not begun under the counts affected by the probation order."

In his dissenting opinion in the *Phillips Case*, Judge Collet said, 212 F. 2d 327:

"It is suggested that the revisers of Title 18 of the Code did not intend that the functions of the judiciary relating to probation should overlap or conflict with the functions of the executive branch of the government with reference to custody and good time. The inference appears to be that from the revision should be read into the law a purpose to limit the long-established practice of pronouncing separate sentences for the purpose of reserving jurisdiction to suspend one or more later if the facts warrant. But, as stated in *Kelly* v. *United States*, 209 F. 2d 639 (10 Cir.), decided January 27, 1954, wherever a substantive change was intended by the revision, the reviser's notes so indicate. The reviser's notes indicate that there was no intention to change the power of the courts to suspend sentence and grant probation at any time before the service of the sentence begins. *Kirk* v. *United States*, 185 F. 2d 185 (9 Cir.); *Kelley* v. *United States*, *supra*. Hence, the crux of the present question is whether sentences which are separate and distinct at the time of original sentence automatically and irrevocably become one indivisible general sentence immediately upon the commencement of the service of the first. Or, as stated in the majority opinion, do the sentences, conceded to be separate and several at the time of imposition for purposes of probation, become 'for purposes of custody, the exact equivalent of a general sentence of imprisonment for the same number of years'? To warrant that assumption it is necessary to assume that the power of probation is abruptly and automatically shut off by incarceration on an antecedent sentence and custody is the only remaining function to be performed. That assumption is not sound, yet it is made the ground for denying

any remaining power in the courts over sentences not yet begun. That, of course, is the exact purpose and effect of the majority opinion. But it seems to me that to give the Act such a narrow construction is unwarranted and not consistent with recognized rules of statutory construction of remedial legislation.

And it is to be said that the retention of the power later to suspend a sentence the execution of which has not yet begun, will cause harassment of the District Courts the answer is that those courts may, in a case free from doubt as to the proper duration of imprisonment, impose a general sentence on all counts and forever bar any application for suspension and probation as to any part after its service has begun. But if the court is in doubt, and that must inevitably be the case in many instances, it should have the power, as it has been done in the past, to pronounce separate sentences of imprisonment and thereby reserve the power later to suspend one or more, the service of which has not yet begun. In the latter cases the District Courts have the absolute discretion to hear or not to hear applications for probation with or without the presence of the defendant. And their refusal or consent to do so, and their action in granting or refusing to grant probation on the merits of each case, are not subject to appellate compulsion or review. *United States* v. *Williams*, 12 F. 2d 65.

The original Probation Act by implication and the amended Act explicitly give the power to the courts to pronounce separate sentences. Under the original Act, the power and jurisdiction of the courts over probation extend to the time of the beginning of the execution of the several sentences. That power is not changed by the revision. Probation is by statute a judicial, not an executive function. There is nothing in the original Act or the revised Code which indicates a legislative intent automatically to divest the courts of jurisdiction over probation as to a sentence not commenced, when the custody of a defendant is vested in the executive on another sentence. And there is noth-

ing in the Code which requires a merger of all sentences into one and a figurative transfer of jurisdiction over probation from the courts to the penal authorities as to sentences not yet commenced. In my opinion the majority opinion does that, without legislative sanction."

From the foregoing it is clear that there is an irreconcilable conflict in the decisions of the four Circuits.

CONCLUSION.

This court has accepted jurisdiction of this case no doubt by reason of the conflict discussed herein.

It is strongly urged that this court rule that a district court assessing sentences to run consecutively that said sentences are not merged into a single sentence but that the court, at any time before commencement of the service of any sentence to be served, may suspend execution of that sentence and place defendant on probation.

The trial judge who heard the evidence and saw the defendant in court, with the record of his behavior while confined, should not be deprived of the right to place defendant on probation. Should the terms of probation be violated, then this same judge, with full knowledge of the background of the defendant and the crime committed could readily re-assess punishment to the defendant.

From the foregoing it is urged that this court reverse the decision of the United States Court of Appeals for the Eighth Circuit, and direct the District Court to entertain the motion filed therein.

Respectfully submitted,

HARRY F. MURPHY,
806 Commerce Building,
Kansas City, Missouri,
Attorney for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

HARRY F. MURPHY,
806 Commerce Building,
Kansas City, Missouri,
Attorney for Petitioner.

E. L. MENDENHALL, INC., 924 WYANDOTTE, KANSAS CITY, MO., HARRISON 5050

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REPLY BRIEF OF PETITIONER.

The United States has filed its brief in which it seeks to have the judgment of the Court of Appeals affirmed and bases its argument mainly on the holding of this court in *United States* v. *Murray*, 275 U. S. 347.

The opinion of the Court in that case merely states that Frederick H. Cook was sentenced to a total of 14 years and 9 months. During the service of part of that sentence his application was filed and an order was entered placing him on probation in the district where he was sentenced.

In the Murray case, decided in the same appeal, Murray was sentenced to 3 months on 6 counts, the terms to run concurrently. From the facts as stated in the record clearly the District Court lost jurisdiction, the service of the sentences having already started.

On page 9 of its brief the Government inadvertently stated that the petitioner's application was filed 9 years after commitment, whereas the record clearly shows that the petitioner was serving the first 5 years and had been confined under that sentence for a period of 4 years (R. 18, 11, 12, 13).

In the Kirk case, cited by the petitioner in his brief and also mentioned in the Government's brief, three defendants were sentenced to 17½ years on the first count of an indictment; 17½ years on the second count; and 2 years on the third count, the sentences to run consecutively. But the Court of Appeals for the Ninth Circuit, in considering the application in the *Murray case* (186 F. 2d l. c. 187), stated:

> "The order of February 1, 1949, was entered upon the court's own motion and without affording the defendant an opportunity to be heard, the Court being persuaded that the case of *Bradford* v. *United States*, 5 Cir., 156 F. 2d 210, was determinative and that the order suspending the sentences as to him was beyond the court's jurisdiction.
>
> "The Bradford case is to be distinguished in that in that case the defendant had begun the service of the sentence which the court undertook to reduce. The conclusion reached there was proper in view of the cases of *United States* v. *Murray*, and *Cook* v. *United States*, 275 U. S. 347, 48 S. Ct. 146, 72 L. Ed. 309, where it was held that the trial court was powerless to change a sentence after the service of the sentence had begun, and that any other construction of the Probation Act

would be inconsistent with the parole powers of the Board of Parole and the executive power of clemency. The Bradford case stated that the beginning of the service of the sentence was not the controlling factor and held that any authority of the court which imposed the sentence to change the same expired with the term of the court during which the sentence was imposed. The court was there dealing with the scope of the inherent power to reduce a sentence, not with the power under the Probation Act."

Title 18, U. S. C. A., Sec. 4161, dealing generally with the computation of good time allowances, provides:

> "When two or more consecutive sentences are to be served, the aggregate of the several sentences shall be the basis upon which the deduction shall be computed. June 25, 1948, c. 645, 62 Stat. 853."

We think the language is persuasive and establishes that the use of the plural (sentences) indicated that Congress had in mind that sentences would be considered as separate from one another although the total time to be served determined the statutory allowance.

CONCLUSION.

We again urge the Court to reverse the decision of the Court of Appeals in this case and hold that the District Court has jurisdiction to entertain the motion filed in that Court.

Respectfully submitted,

HARRY F. MURPHY,
806 Commerce Building,
Kansas City, Missouri,
Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

LONNIE AUFFONTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 790

LONNIE AFFRONTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. 15) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1955 (Pet. 15). The petition for a writ of certiorari was filed on May 12, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, after a cumulative sentence on multiple counts of an indictment has been imposed and several of the sentences have been served, a district

court may, under 18 U.S.C. 3651, grant probation as to the unserved sentences.

STATUTE INVOLVED

The pertinent portion of 18 U.S.C. 3651 provides:

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.
>
> Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both such fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.
>
> The court may revoke or modify any condition of probation, or may change the period of probation.

STATEMENT

Convicted on counts two to ten of a ten-count indictment for violation of the Harrison Narcotic

Act (R. 6), petitioner was sentenced to five years on each count, to run consecutively (R. 7, 19). On counts six to ten, execution of the sentences was suspended and petitioner placed on probation to commence after expiration of the sentences imposed on counts two to five (R. 7).

Petitioner began serving his sentence on count two on October 14, 1949 (R. 20). On July 14, 1953, while still serving count two, he filed a motion to stay execution of sentence, modify it, and place him on probation (R. 12).

The district court acknowledged that its custom had been to grant probation, when appropriate, on unserved consecutive sentences of a multiple-count indictment until the decision of the Court of Appeals for the Eighth Circuit in *Phillips* v. *United States*, 212 F .2d 327, held that it had no power to do so. The motion was therefore denied for want of power. (R. 15.)

On appeal, the court of appeals adhered to its decision in the *Phillips* case, *supra*, with one judge dissenting (Pet. 15).

DISCUSSION

We agree with petitioner that the instant holding is in direct conflict with that of the Ninth Circuit in *Kirk* v. *United States*, 185 F. 2d 185 (Pet. 5). The Eighth Circuit in its opinion in the instant case (Pet. 17) and in the *Phillips* case, *supra*, at pages 331, 355, recognized the contrary holding of the Ninth Circuit. It pointed out that its decision in the *Phillips* case, *supra*, was being followed in the Fourth Circuit (Pet. 17, 18). *Mann* v. *United*

States, 218 F. 2d 936 (C.A. 4); *Stern* v. *United States*, 219 F. 2d 263 (C.A. 4).[1]

The diverging point in this conflict of circuits is whether a cumulative sentence is, for the purposes of probation, the same as a general sentence, as to which the law is settled. In *United States* v. *Murray* and *Cook* v. *United States*, 275 U.S. 347, this Court decided there was no power in the federal courts to grant probation under the Probation Act of 1925, 43 Stat. 1259, upon which the statute here involved is based, after the defendant has served any part of the sentence. The *Phillips* case, *supra* at 332, points out that this Court was dealing with a cumulative sentence in the *Cook* case, so that the question in the instant case has been before the Court. However, in the briefs before the Supreme Court and in the opinion itself at page 351, the sentence of Cook is referred to merely as "a total of fourteen years and nine months," and no issue was made of its cumulative nature.

---

[1] We do not believe, however, that the Tenth Circuit is in conflict with the Eighth and Fourth Circuits, as alleged by petitioner (Pet. 5, 6), as the same factual basis for a decision has not arisen there. *Kelley* v. *United States*, 209 F. 2d 638 (C.A. 10), involved a prisoner who was serving a sentence on one indictment and sought suspension of sentence on another indictment he had not yet begun to serve. *White* v. *Steigleder*, 37 F. 2d 858, 859 (C.A. 10), does contain dicta to the effect that a cumulative sentence is severable for purposes of probation, but the case actually held that the intervention of an appeal did not affect the power of the district courts to grant probation, as the appellee, whose convictions were upheld on appeal, still had the status of an offender whose sentence had not begun.

In view of the conflict between the Ninth Circuit and the Eighth and Fourth Circuits, we do not oppose the granting of certiorari in this case.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

MAY 1955.

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No. 71

In the Supreme Court of the United States

OCTOBER TERM, 1955

LONNIE AFFRONTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

SIMON E. SOBELOFF,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
CHARLES F. BARBER,
Assistant to the Solicitor General,
BEATRICE ROSENBERG,
ISABELLE R. CAFFELLO,
Attorneys,
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

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LONNIE AFFRONTI, PETITIONER

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 19–21) is reported at 221 F. 2d 150. The order of the district court (R. 13–14) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 13, 1955 (R. 22). The petition for a writ of certiorari was filed on May 12, 1955, and granted on June 6, 1955 (R. 23). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, after a sentence of consecutive terms on multiple counts of an indictment has been imposed and service of sentence for the first such term has commenced, a district court may, under 18 U. S. C. 3651, suspend sentence and grant probation as to the unserved term or terms.

STATUTE INVOLVED

18 U. S. C. 3651 provides:

> § 3651. *Suspension of sentence and probation.*
>
> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.
>
> Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

The defendant's liability for any fine or other punishment as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation. (June 25, 1948, ch. 645, 1, 62 Stat. 842.)

STATEMENT

The indictment in this case was filed on January 21, 1932 (R. 1), and charged petitioner in ten counts with selling narcotics. In 1937 he was arrested in the State of New York and charged with carrying a concealed weapon (R. 11). Upon conviction, he was sentenced to serve a term of seven to fourteen years, which sentence was served in five years (R. 11). This was followed by a federal sentence of one to three years for posses-

sion of narcotics for which petitioner was indicted and convicted while in the penitentiary in the State of New York (R. 11).

Upon completion of the latter sentence, petitioner was released to the authorities of Ray County, Missouri, where he was convicted of second degree murder and sentenced to ten years (R. 11, 12).

While in Missouri State Penitentiary, petitioner was released on a writ of habeas corpus ad prosequendum to be tried on this ten-count indictment for selling narcotics (R. 12, 17). On January 24, 1944, a jury found him guilty on counts two to ten (R. 6). He was sentenced to five years on each count to be served consecutively (R. 6, 17), and to commence at the expiration of the sentences he was already serving in Missouri (R. 7, 17). Execution of sentences imposed on counts six to ten was suspended at the time of sentencing, and probation granted as to them to begin at the expiration of sentences imposed on counts two to five (R. 7, 17).

Petitioner began serving his federal sentence on October 13, 1949 (R. 12). On July 14, 1953, while serving the sentence on count two, he applied for suspension of sentence on counts 3, 4, and 5 and probation (R. 11, 12). His request was denied by the district court on the ground that it had no power under the circumstances to grant probation (R. 14). On appeal, the order was affirmed (R. 21).

SUMMARY OF ARGUMENT

The Federal Probation Act, 18 U. S. C. 3651, grants to federal courts the power "Upon entering a judgment of conviction" to "suspend the imposition or execution of sentence and place the defendant on probation." In *United States* v. *Murray*, 275 U. S. 347, this Court held that the power of the court to grant probation to a defendant sentenced under a general sentence ended once the defendant had begun to serve his sentence. The issue in this case is whether the courts have the power, where a sentence to consecutive terms is imposed, to suspend sentence and grant probation after the defendant is committed to prison but before he has begun to serve the sentence on the term in question. It is the Government's position that the power of the courts to grant probation ends once the service of sentence has begun, and that it makes no difference whether the sentence imposed be a general sentence or a sentence to consecutive terms on multiple counts.

This result is suggested by the language of the statute. "Upon," according to Webster, means "coinciding with or following the time of," "with little or no interval after." The language "upon entering a judgment of conviction" thus denotes immediacy. It would require a strained construction to hold that nine years after entering judgment, as in the instant case, the court had the power to suspend execution of the sentence and grant probation.

It is to be noted that the language of the present statute, which was amended in connection with the incorporation of the Probation Act into the 1948 Criminal Code, is more specific as to time than was the 1925 Act which was before the Court in *Murray*. The earlier Act conferred the power on district courts to grant probation "after conviction." While it is clear from the revisers' notes that no change in the law with respect to the time of granting probation was intended, it appears that the revisers and the Congress understood this Court's decision in *Murray* to mean that probation must be granted "Upon entering a judgment of conviction," and not at any time after service of the sentence imposed by the judgment had begun.

Our contention that a sentence to consecutive terms on multiple counts should be considered the same as a general sentence, once the defendant has been committed to the custody of the Executive branch, is buttressed when the Probation Act is considered in context in the Criminal Code. The provisions relating to parole and good-time allowances require that consecutive terms on multiple counts be considered the same as a general sentence for the same length of time. Nothing in the Probation Act suggests that it was intended to deal with the release from prison of a person confined in the execution of a judgment, or to empower a court to set at naught

the limitations and restrictions of the parole and commutation statutes.

Moreover, it would be unfair and unjust to make the exercise of the power to grant probation depend upon the type of sentence the prisoner was serving. There is little uniformity in the forms of sentences courts impose. Some prefer general sentences; others, sentences to consecutive terms. To maintain uniformity in the treatment of prisoners after commitment, the two types of sentences should be considered of the same effect as they are in the case of parole and good-time allowances.

Our position finds support in the considerations deemed controlling by this Court in *Murray* in holding that the power of district courts to grant probation ended once the defendant commenced service of his sentence.

The Court in *Murray* noted that the dominant purpose of probation was to provide a method whereby youthful and first offenders could be punished without suffering the ostracism of imprisonment. The proponents of the legislation had stressed that it was far easier to reclaim an unhardened early offender without commitment to a prison than after it. The question of probation was deemed to arise at the time of sentencing and was not intended as a means of shortening the sentence of an offender once committed. To sanction the use of probation to release peti-

tioner from prison after nine years of confinement, as petitioner suggests, would thus be inconsistent with the basic purpose of the probation legislation.

Secondly, the Court reasoned in *Murray* that it should not be assumed that Congress in the Probation Act intended to create a judicial remedy applicable to persons in the custody of the Executive which intruded upon and overlapped the Executive power to pardon or parole. The problem of overlapping responsibility is of course the same whether the prisoner is committed under a general sentence or under a sentence of consecutive terms. Cases of the latter class which have arisen illustrate situations where petitions by the prisoners concerned for release from prison had previously been rejected by the parole or pardon authorities. *Phillips* v. *United States*, 212 F. 2d 327 (C. A. 8); *United States* v. *Soeder*, 120 F. Supp. 594 (N. D. Ill.). The Court of Appeals for the Fourth Circuit has suggested that it "would manifestly be confusing and disruptive of prison discipline to allow both the courts and the executive department to deal with punishment." *Mann* v. *United States*, 218 F. 2d 936, 939.

Finally, this Court in *Murray* stressed that it should not unnecessarily assume that Congress intended to impose additional work on the district courts by requiring them to consider applications

for probation long after convicts had been out of the jurisdiction of the court. This consideration, of course, has precisely the same force regardless of the type sentence defendant is serving. As stressed by the courts which have since considered the matter, an important aspect of this consideration arises from the fact that the information which bears on the merits of an application for probation by a prisoner would be peculiarly within the knowledge of the Executive authorities vested with the responsibility for granting parole or pardon. Thus, in this case petitioner's application was brought nine years after commitment, before a judge totally unfamiliar with the case and the offender, and the merits of the application turn largely on the prison record of petitioner and on his developing personal character, matters peculiarly within the competence of the parole authorities.

We conclude that Congress provided that probation should be granted at the time of sentencing and before service of any part of the sentence has commenced, when the judge who tried the case has at hand the information to exercise the discretion granted him by law. Thereafter, under the statutory scheme, the question of release of the prisoner from custody is the responsibility of the Executive branch.

ARGUMENT

WHERE A SENTENCE OF CONSECUTIVE TERMS ON MULTIPLE COUNTS IS IMPOSED, THE COURT'S POWER TO SUSPEND SENTENCE AND GRANT PROBATION ENDS WHEN SERVICE OF SENTENCE FOR THE FIRST SUCH TERM BEGINS

In *United States* v. *Murray*, 275 U. S. 347, this Court held that once a prisoner had entered upon service of a sentence, a court was without power to grant probation as to that sentence. Hence, as to a general sentence on multiple counts, the beginning of service of the sentence marks the limit of time within which a court may grant probation. That decision, of course, also settles the question as to concurrent sentences upon multiple counts since the day sentence starts on the first count, it starts on all the others.

Where, however, a sentence of consecutive terms is imposed on several counts of an indictment, a division of opinion has arisen as to the time within which probation may be granted. The Ninth Circuit in *Kirk* v. *United States*, 185 F. 2d 185, and the Tenth Circuit, *obiter dictum*, in *White* v. *Steigleder*, 37 F. 2d 858, 859, treat a sentence to consecutive terms as a series of sentences and hold that the power to suspend sentence and grant probation may be exercised on any count, at any time before service of the period of imprisonment on such count has com-

menced.[1] The Eighth Circuit in the instant case and in *Phillips* v. *United States*, 212 F. 2d 327, the Fourth Circuit in *Mann* v. *United States*, 218 F. 2d 936, and a district court in the Seventh Circuit, *United States* v. *Soeder*, 120 F. Supp. 594 (N. D. Ill.), treat the several consecutive terms in the aggregate for purposes of probation and hold that the court's power to suspend sentence and grant probation ends when the defendant is committed to the custody of the Executive branch and starts to serve any portion of his total sentence.[2]

It is the Government's position that the view of the Eighth and Fourth Circuits is the correct one under this Court's decision in the *Murray* case. This view is supported by the language and purpose of the probation statute. It is, moreover, a reasonable and practical interpretation of the statute in that it reconciles all the provisions for relief and release of federal prisoners—probation, parole, commutation and executive clemency—so as to eliminate confusing overlap between judicial and executive functions.

---

[1] In the past the Department of Justice, without consideration of the point of law involved, has at times acquiesced in the suspension of sentence and grant of probation to prisoners after commitment with respect to terms they had not yet begun to serve.

[2] See also *Stern* v. *United States*, 219 F. 2d 263, 265 (C. A. 4); *Mouse* v. *United States*, 14 F. 2d 202 (D. Kans.).

A. THE DECISION OF THIS COURT IN *UNITED STATES* v. *MURRAY* IS CONTROLLING

In *United States* v. *Murray*, 275 U. S. 347, this Court construed the Probation Act of 1925, 43 Stat. 1259, which provided in pertinent part: "That the courts of the United States * * * shall have power, after conviction or after a plea of guilty or nolo contendere * * * to suspend the imposition or execution of sentence and to place the defendant upon probation * * *." That language is, on its face, broader than the present statute which confers the power to grant probation "[u]pon entering a judgment of conviction." Nevertheless, this Court, although recognizing that a broader construction was possible, held (*id.* at 356–357) that it was in keeping with the Congressional purpose to construe the statute to mean that the power of a district court to grant probation ended once a person sentenced to imprisonment had begun to serve his sentence:

> The Probation Act gives power to grant probation to a convict after his conviction or after a plea of guilty, by suspending the imposition or suspending execution of the sentence. This probation is to be after conviction or plea of guilty. The question is—Before what time must it be granted? Two answers to this latter question are possible. It must either be grantable at any time during his whole sentence or be limited to a time before execution of the sentence begins. If the first answer is adopted, it would confer very comprehensive power on

> the district judges in the exercise of what is very like that of executive clemency in all cases of crime or misdemeanor. It would cover in most cases the period between the imposition of the sentence and the full execution of it. It will cover a period in which not only clemency by the President under the Constitution might be exercised but also the power of parole by a Board of Parole abating judicial punishment to the extent of two-thirds of it as to all crimes punishable by imprisonment for more than one year. It seems quite unlikely that Congress would have deemed it wise or necessary thus to make applicable to the same crimes at the same time three different methods of mitigation.
>
> Nor can we suppose that Congress would wish to grant such extended power in all but life and capital cases to the district judges and thus subject each to the applications of convicts during the entire time until the full ending of the sentences. This would seem unnecessary for the hard worked district judges with their crowded dockets. A more reasonable construction is to reconcile the provisions for probation, parole and executive clemency, making them as little of a repetition as we can.
>
> * * *

The Court reviewed the legislative history of the 1925 Act (275 U. S. at pp. 354–356) and found that the dominant purpose of Congress in granting probation powers to the federal courts was to

enable them at the time of sentencing to impose a punishment suitable to the youthful or first offender, not to shorten the term of imprisonment. Thus it found that it was not the purpose of the statute to free a prisoner once incarcerated to whom parole, commutation and executive clemency already applied (*id.* at 357–358):

> The great desideratum was the giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment. * * * The avoidance of imprisonment at the time of sentence was therefore the period to which the advocates of a Probation Act always directed their urgency. Probation was not sought to shorten the term. * * *

Accordingly, the court held that the words "shall have power, after conviction or after a plea of guilty or nolo contendere, * * * to suspend the imposition or execution of sentence and to place the defendant upon probation" meant that the placing of the defendant upon probation was to follow the suspension of sentence, "without an interval of any part of the execution." That, the Court said, was "a reasonable construction and serves the well understood purpose of the statute." (*Id.* at 358.)

The *Murray* decision covered two cases, *United States* v. *Murray* and *Cook* v. *United States*. Murray had served one day of a three-months'

sentence for violation of the National Prohibition Act when the sentencing court placed him on probation.[3] Cook had served three and one-half years of a sentence totalling fourteen years and nine months[4] imposed upon twelve counts charging mail fraud, for which the maximum sentence on any one count was five years. It is perhaps significant that the Court did not suggest that there was any difference in the power of the court to grant probation whatever the form of the sentence. The focal point of the Court's decision was rather that the power to grant probation under the statute did not survive the beginning of imprisonment. As we spell out at pp. 22–29, *infra*, the rationale of the decision leads inescapably to the conclusion that the same result follows whether the defendant be sentenced under one count; or to a general term or concurrent terms on multiple counts; or to consecutive terms on multiple counts, as in the instant case.

[3] In fact, Murray had been sentenced to three months imprisonment on each of six counts, the terms to run concurrently. Record in *United States* v. *Murray*, 275 U. S. 347, No. 394, O. T. 1927, p. 6.

[4] It appears that Cook was in fact sentenced to consecutive terms, to wit, to five years upon each of the first three counts, to be served concurrently, followed by 13 months' imprisonment on each of the remaining nine counts, to be served consecutively. See *Phillips* v. *United States*, 212 F. 2d 327, 332 (C. A. 8). The sentence was described to this Court, however, as though it were a general one for "a total of fourteen years and nine months." See 275 U. S. at 351; Record in *Cook* v. *United States*, No. 539, O. T. 1927, p. 1.

terms are considered together in the aggregate as a general sentence. But if by judicial construction a power is found to have been placed in the courts to reach persons in the custody of the Executive and grant probation, a possibly conflicting overlap in jurisdiction will be created.

This factor was stressed by Judge Sanborn in his decision for the majority in *Phillips* v. *United States*, 212 F. 2d 327 (C. A. 8). The defendant in that case was serving the third of five consecutive terms at the time he applied for probation. He had already sought and been denied parole by the parole authorities. He then turned to the district court and sought release on probation for the terms which he had not yet begun to serve. The Court of Appeals for the Eighth Circuit concluded that Congress could not have intended to confer on the courts power, in effect, to overrule the parole authorities and grant probation to a person then imprisoned. The court said (212 F. 2d at 330):

> In dealing with the problem involved in this case, it must be kept in mind that the law by virtue of which the District Courts have power to suspend the imposition or execution of sentences and place defendants on probation is no longer an isolated statute but a part of a comprehensive and orderly revision of all of the statutes relating to federal crimes and criminal procedure. The revision of Title 18 of the United States Code included not only the

> law relating to probation but also the law pertaining to executive procedures for the relief or release of federal prisoners, including good time allowances and parole. This carefully prepared and complete revision of Title 18 of the United States Code was enacted by Congress on June 25, 1948, 62 Stat. 683–868. Those who drafted the revision and those who enacted it certainly intended that the functions of the judiciary under Chapter 231 of Title 18 U. S. C., 62 Stat. 841, relating to probation, should not overlap or conflict with the functions of the Attorney General and the Director of the Bureau of Prisons with respect to the custody of federal prisoners and good time allowances under Chapter 309, Title 18 U. S. C., 62 Stat. 853, or the functions of the Board of Parole under Chapter 311, Title 18 U. S. C., 62 Stat. 854, or the powers of the President relative to executive clemency.

Compare the situation in *United States* v. *Soeder*, 120 F. Supp. 594 (N. D. Ill.), where it appears that a prisoner serving a sentence of five consecutive terms sought the suspension of the last three such terms and probation. In holding that he was without power to grant the petition (p. 597). Judge Campbell referred to the fact that Soeder was "imprisoned in an institution governed and maintained by the Executive, not the courts, and the Executive is better qualified than any court to grade petitioner's behavior," and added:

> The facilities which contribute to intelligent decisions, such as the comprehensive reports of the Probation Officers, are not available after the defendant is delivered to prison. He is then supervised and guided by persons responsible to the Executive, and responsibility for his behavior properly shifts from the court to the Executive. This division of power has worked well, and the court will not disturb it now * * *

The Court of Appeals for the Fourth Circuit, in considering the same problem, felt that it "would manifestly be confusing and disruptive of prison discipline to allow both the courts and the executive department to deal with punishment" after the prisoner had been delivered to the Executive branch for punishment. *Mann* v. *United States*, 218 F. 2d 936, 939.

It is important, of course, too, that the parole and pardon officials should know when they have sole responsibility for the relief of prisoners, and when and if that responsibility is shared with the courts.

Finally, this Court in *Murray* stressed that it should not unnecessarily assume that Congress intended to impose additional work on the district courts by requiring them to consider applications for probation long after convicts have been out of the jurisdiction of the court. This consideration, of course, has precisely the same force whether probation be sought with respect to a term then being served, as in *Murray*, or with respect to

subsequent terms imposed at the same time, as in the instant case. In either situation, the problem arises because of the fact that the application for probation might be submitted long after the defendant had been committed. As stressed by the courts which have since considered the matter, an important aspect of the problem stems from the fact that the information which bears on the merits of an application for probation is peculiarly within the knowledge of the executive authorities vested with the responsibility for granting parole or pardon. See Judge Campbell's remarks quoted at pages 25–26, *supra*. Similarly, Judge Sanborn, in *Phillips* v. *United States*, 212 F. 2d at 331, referred to the "superior opportunity" of the Board of Parole to watch the conduct and appraise the character of a prisoner. And Judge Chesnut said in this connection:

> "* * * The district judge has little or no opportunity to learn the conduct and behavior of the prisoner after he begins service of the sentence. On the other hand, the Parole Board does have this opportunity and is much better able to determine whether, upon the expiration of one-third of the sentence, it is consistent with the public interest to release the prisoner from confinement on parole. And in the case of a comparatively long sentence it is quite possible, if the court has the power to suspend part of the sentence at any time during the primary sentence and be-

> fore the beginning of the consecutive sentence, that the application for the suspension would have to be submitted to a judge other than the trial judge in the particular case who would naturally be much more familiar with the case than another judge who is called upon to act in the matter many years later"

United States v. *Bernett,* 123 F. Supp. 841, 846 (D. Md.), quoted with approval in *Mann* v. *United States,* 218 F. 2d 936, 940 (C. A. 4).

The considerations stressed by Judge Chestnut are illustrated by the facts of the instant case. Petitioner was sentenced by Judge Collet in 1944. His application for probation was made nine years later. It has necessarily been brought before a different judge because the sentencing judge is no longer on the district bench, having been appointed to the Court of Appeals for the Eighth Circuit in the interim. This means that the matter came before a judge totally unfamiliar with the case and the offender. Moreover, the merits of the application depended largely on the prison record and developing character of petitioner, peculiarly within the knowledge and special competence of the parole authorities. We submit that Congress provided for the establishment of boards of parole for the purpose of considering the wisdom of early release of prisoners then in confinement, and that this court was correct in

Murray in assuming that Congress could not have intended the Probation Act to place an overlapping responsibility in the district courts.

In short, all the considerations which led this Court in the *Murray* decision to conclude that the power to grant probation "after conviction" did not extend beyond the time when a prisoner started to serve his sentence apply whether the sentence is imposed on a single count, or is a general, concurrent, or cumulative sentence on multiple counts. They apply with even greater force at the present time when the statute requires that probation be granted "Upon entering a judgment of conviction." The time for granting probation is the time of judgment and before service of any part of the sentence has commenced, when the judge who tried the case has at hand the information required to exercise the discretion granted him by law. Thereafter, under the statutory scheme, the question of release of the prisoner from custody is the responsibility of officers of the Executive branch.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
CHARLES F. BARBER,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
ISABELLE R. CAPPELLO,
Attorneys.

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B. THE LANGUAGE OF THE PROBATION STATUTE, AS AMENDED SUBSEQUENT TO THE *MURRAY* DECISION, IN ITS CONTEXT IN THE CRIMINAL CODE, REINFORCES THE CONCLUSION THAT PROBATION CANNOT BE GRANTED AFTER SERVICE OF ANY PART OF A SENTENCE HAS COMMENCED

The Probation Act empowers district courts to suspend sentence and grant probation "Upon entering a judgment of conviction." 18 U. S. C. 3651. "Upon," according to Webster, means "coinciding with or following the time of," "with little or no interval after." The language thus denotes immediacy. It would require a strained construction to hold that nine years after entering the judgment, as in the instant case, a court had the power to suspend execution of the sentence and grant probation.

The phrase "Upon entering" may be contrasted with the language contained in the Probation Act of 1925, which was before this Court in the *Murray* decision. The 1925 Act conferred the power on district courts to grant probation "after conviction." The ambiguity under the 1925 Act as to the time before which probation must be granted was settled by the *Murray* decision. The Act was amended in 1948 in connection with its incorporation into the Criminal Code. The phrase "Upon entering a judgment of conviction" was inserted, and the words "after conviction" were deleted.[5] It is clear from the revisers' notes

[5] In accord with the practice of the federal courts, which was approved by the Court in *Frad* v. *Kelly*, 302 U. S. 312, 315, and *Osman* v. *United States*, 303 U. S. 617, the codifiers also added the clause "Probation may be limited to one or

that no change in the law with respect to the time of granting probation was intended," which suggests that the revisers and the Congress understood this Court's decision in *Murray* to mean that probation must be granted "Upon entering a judgment of conviction," and not at any time after service of the sentence imposed by the judgment had begun.

It should be noted further that both the original and the amended probation statutes confer the power to "suspend * * * sentence." The fact that the singular rather than the plural form of the word "sentence" is used buttresses our contention that a sentence of consecutive terms on multiple counts should be considered for present purposes the same as a general sentence, for obviously the probation statute has equal application to a judgment imposing consecutive sentences as to one imposing a general sentence on multiple counts,

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more counts or indictments" to the original Probation Act's provisions. This appears to be an extension of the original concept of probation as a relief from *any* imprisonment. While, as petitioner argues (Br. 10), it thus appears that consecutive sentences imposed on separate counts of the same indictment may be considered separately for the purpose of the granting of probation "[u]pon entering a judgment of conviction," it does not follow, for reasons spelled out in this brief, that they may be so considered once service of sentence under the judgment has commenced and defendant has been committed to the custody of the executive branch.

[*] See *Kirk* v. *United States*, 185 F. 2d 185, 188 (C. A. 9). For this reason it would appear that district courts, as held in *Murray*, have the power under the amended act to grant probation at any time prior to the time service of sentence is commenced.

Our contention that a sentence to consecutive terms on multiple counts should be considered the same as a general sentence, once the defendant has been committed to the custody of the executive branch, is also buttressed when the Probation Act is considered in context in the Criminal Code. The Probation Act is a part of a comprehensive code covering federal crimes and the administration of criminal justice. See *Phillips* v. *United States*, 212 F. 2d 327, 330 (C. A. 8). It is significant that, with respect to matters relating to custody and parole, the Code uniformly requires that the total sentence imposed under a judgment of conviction, including a sentence to consecutive terms on multiple counts, be considered in the aggregate as a single sentence of imprisonment.[7] Thus, for purposes of parole, the one-third of the time to be served, after which the prisoner becomes eligible for parole, is that of the "term or terms" for which the offender is confined. 18 U. S. C. 4202.[8] Similarly, good-

[7] Of course, the question whether consecutive terms are to be considered separately or in their totality depends upon the context in which the question arises. See *Dimmick* v. *Tompkins*, 194 U. S. 540, 541. We have seen that in imposing sentence the trial court may impose imprisonment as to some counts and grant probation as to others. See p. 16, fn. 5, *supra*. Similarly, for purposes of review, each count is necessarily considered separately since the evidence as to each count is different.

[8] § 4202. *Prisoners eligible.*

"A Federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and serving

time allowances are computed on the basis of the aggregate of the terms to be served. 18 U. S. C. 4161.[9] Thus it appears from its context that Congress considered that, for purposes of custody, consecutive terms on multiple counts should be considered the same as a general sentence for the same length of time.[10]

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a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving *one-third of such term or terms or* after serving fifteen years of a life sentence or of a sentence of over forty-five years." Acts of June 25, 1948, ch. 645, § 1, 62 Stat. 854; July 31, 1951, ch. 277, 65 Stat. 150. [Emphasis added.]

[9] "When two or more consecutive sentences are to be served, the aggregate of the several sentences shall be the basis upon which the deduction shall be computed." Act of June 25, 1948, c. 645, § 1, 62 Stat. 853.

[10] Rule 35, Federal Rules of Criminal Procedure, provides that the court "may reduce a sentence within sixty days after the sentence is imposed * * *" The notes of the advisory committee indicate that this provision was intended to introduce a flexible time limitation on the power of the court to reduce a sentence, in lieu of the former limitation of the term of court. See *United States* v. *Benz*, 282 U. S. 304. While the federal rules made no change in the *Murray* rule as to the time within which a court retained the power to suspend a sentence and grant probation (see Federal Rules of Criminal Procedure with Notes and Institute Proceedings (N. Y. U. School of Law, 1946), p. 207), Rule 35 may properly be taken as indicating a general policy as to the time within which a criminal case, after conviction, should be finally disposed of by a district court. See *Phillips* v. *United States*, 212 F. 2d 327, 334 (C. A. 8); *Mann* v. *United States*, 218 F. 2d 936, 939 (C. A. 4).

It would appear that, for present purposes, consecutive terms on multiple counts should similarly be considered the equivalent of a general sentence. If the Probation Act were construed to authorize a court to order the release of a prisoner confined under a sentence consisting of consecutive terms with respect to terms as to which service had not yet commenced, the court could "set at naught the limitations and restrictions of the parole and commutation statutes, leaving the system established by those statutes in force only so far as [the court] in the exercise of an unrestricted discretion, may permit it to remain in force." *United States* v. *Cook*, 19 F. 2d 826, 828 (C. A. 5), affirmed, *United States* v. *Murray*, 275 U. S. 347. Nothing in the Probation Act suggests that it was intended to deal with the release from prison of a person confined in the execution of a judgment, or that it "changed, modified, or to any extent repealed or superseded the statutes dealing with that subject." 19 F. 2d at 828.

Moreover, if the power to grant probation to a federal prisoner as to unserved parts of a sentence were to be conferred on the district courts, it would be "both unsound and unjust to make the exercise of the power depend upon the type of sentence the prisoner was serving. There is little uniformity in the forms of sentences which courts impose." *Phillips* v. *United States*, 212 F. 2d at 335. In determining the total time to be

served by a defendant, the trial judge necessarily considers all the counts upon which the offender has been found guilty. One judge may sentence the offender to one year on three counts, to run consecutively. Another judge may frame the same sentence as a general one for three years. Still another judge may sentence the offender to three years on each count, to run concurrently. Regardless of the form of the sentence, the inescapable fact is that each judge has sentenced the offender to three years. Each offender will come up for parole at the same time and be eligible for good-time allowances at the same rate. The fact that separate sentences were imposed by two of the judges on the several counts has no significance as related to probation.

To maintain the uniformity of treatment of prisoners after commitment, a sentence to consecutive terms should be considered in its totality. Otherwise, the offender who received a sentence of consecutive terms is placed in a preferred position with respect to probation over those equally culpable offenders whose sentencing judges happened to use a general or concurrent type sentence for the same length of time. There is no indication that Congress intended that prisoners sentenced to consecutive terms should be eligible for probation on each such term until such time as they begin to serve the term. There are enough vagaries in sentencing without introducing another by interpreting the probation statute so as to bring about this anomalous result.

C. THE CONSIDERATIONS WHICH LED THIS COURT IN *MURRAY* TO CONCLUDE THAT PROBATION COULD NOT BE GRANTED AFTER SERVICE OF SENTENCE HAD BEGUN REQUIRE THE SAME RESULT REGARDLESS OF THE TYPE OF SENTENCE IMPOSED.

Our argument that the duration of the court's power to grant probation under the Probation Act is the same, whatever the type of sentence imposed, finds support in the considerations deemed controlling by this Court in holding that the power of district courts to grant probation ended once the defendant commenced service of his sentence. We have seen that in *Murray* this Court stressed three considerations: (1) that the dominant purpose of probation was to provide a method whereby defendants, such as repentant youthful or first offenders, could be punished without suffering the ostracism of imprisonment;[11] (2) that it should not be assumed that Congress in the Probation Act intended to create a judicial remedy applicable to persons in the custody of the Executive which intruded upon and overlapped the executive power to pardon or parole; and (3) that it should not be assumed that Congress intended to subject hard-worked district judges to applications for parole during the entire time convicts were in custody. Each of these considerations has equal force in support of our position in the instant case.

[11] It had been held prior to the Probation Act that district courts had no power to suspend sentences. *Ex parte United States*, 242 U. S. 27. See *United States* v. *Murray*, 275 U. S. at 354.

Probation deals with the situation existing at the time of sentencing. As the proponents of the legislation stressed before Congress, "The result of long experience with the probation system shows that it is far easier to reclaim an unhardened early offender without commitment to a prison than after it." See H. Rep. No. 1377, 68th Cong., 2d Sess., p. 4. What was needed was a form of punishment which would enable the court to avoid imposing a term of imprisonment in suitable cases while keeping the offender under the supervision of the court. It was not the function of probation to shorten the sentence of an offender once committed. See 275 U. S. at 358. Parole and good-time allowance and executive clemency were available for that purpose when the 1925 Act was passed, and are still available. To treat consecutive terms on multiple counts of an indictment separately and construe the statute so as to permit probation to be granted long after imprisonment had begun would be, in effect, to sanction its use as a means of shortening the sentence. Such a construction would be inconsistent with the basic purpose of the probation legislation.

This construction would also create a region of overlapping authority between the power of the courts to grant probation and the power of the Executive to pardon or parole. As we have seen, for purposes of pardon or parole, consecutive